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No. 89-1493

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In the  
*Supreme Court of the United States*  
October Term, 1990

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AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,  
*Petitioner,*  
v.

JOSEPH E. O'NEILL, et al.,  
*Respondents.*

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**On Writ of Certiorari to the  
United States Court of Appeals for the Fifth Circuit**

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**APPENDIX TO BRIEF AMICUS CURIAE FOR CONTINENTAL  
AIRLINES, INC. IN SUPPORT OF REVERSAL**

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November 15, 1990

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## DECLARATION OF DONALD J. BREEDING

I, Donald J. Breeding, do hereby swear and affirm as follows:

1. Introduction. I am employed by Continental Airlines, Inc. ("Continental") as Senior Vice President, Flight Operations. I held the position of Vice President, Flight Operations at Continental from 1982 through June 1986. I returned to Continental in my present position in November 1988 and have continued in this position to date. My responsibilities include the supervision of all matters relating to the pilot work force and flight operations of Continental. I previously held the position of Vice President-Flight Operations at Texas International Airlines from 1975 through June 1980, prior to the subsequent merger of Texas International into Continental on September 30, 1982. In October 1985, I served as one of the negotiators on behalf of Continental in the negotiation of the Continental-ALPA settlement which was entered as an "Order and Award" of Judge T. Glover Roberts on October 31, 1985. See Attachment A (as amended). I offer this Declaration to clarify certain facts surrounding the 1983-85 ALPA strike against Continental, and the negotiation and implementation of the Continental-ALPA settlement, in order to identify what I believe to be certain errors of fact and mischaracterizations relating to the Continental-ALPA settlement in the Fifth Circuit panel opinion issued October 31, 1989 in *O'Neill et al. v. Air Line Pilots Association*, No. 88-2848.

2. The Settlement Has Been A Success; All Returned Strikers Now Exercise Full Seniority. The panel opinion expresses concern, at p. 455, that the settlement might be viewed to create a permanent cleavage between strikers and non-strikers. It was, and is, in Continental's interest to avoid

such a cleavage, and to end the bitter strike which had created true cleavage. Continental's paramount concern for the safety of the travelling public, makes it an imperative to achieve harmony in the cockpit between the returning pilots and the working pilots. It is my opinion that the settlement was an enormous success in this regard; the Continental pilots have all conducted themselves as professionals, and the hostilities of the strike, see infra at ¶ 5, have been put behind them. Three hundred forty nine pilots returned to work at Continental under the Continental-ALPA settlement (261 under Option 1 and 88 under Option 3). All of those pilots have exercised their full seniority for bidding purposes at least since the Fall of 1987; 320 of these pilots had been advanced into or awarded Captain positions by October 1988.<sup>1/</sup> (The remaining pilots either voluntarily elected to bid for lower status positions or did not have sufficient system seniority to hold a captain position of their choice.) Thus, there is no basis at all for concern about the terms of the settlement creating a permanent cleavage.

3. ALPA Organizing Efforts Among Continental Pilots. ALPA has conducted an organizing campaign among active Continental pilots since 1987, including the period while its Motion for Summary Judgment was pending in the district court and while this appeal was ongoing. See Attachment B (ALPA campaign materials). Based upon my experience with ALPA, and the high priority ALPA placed on that organizing

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<sup>1/</sup> Under the settlement, all returned pilots (except those few who had been on furlough status prior to the strike) retained their full pre-strike seniority, utilized that seniority for all purposes other than initial advancement to Captain and exercised such seniority fully in all bids after their initial service as a Captain. Thus, at all times these returned pilots exercised their full seniority for such purposes as bidding monthly work schedules, bidding for vacation preference, and for all other purposes.

campaign, I believe it likely that ALPA tempered its statements and positions in this litigation in light of their potential political impact on the campaign. Moreover, ALPA successfully sought to seal the record of its negotiator's testimony below from exposure to Continental, (Attachment C), and therefore had obvious strategic problems in any attempt to seek the testimony of Continental negotiators, which ALPA failed to do.

4. O'Neill Group Litigation. The O'Neill Group has indicated in filings in other litigation that it is comprised of approximately 250 of the approximately 2,000 pre-strike Continental pilots, primarily pilots who resigned or retired during the course of the ALPA strike at Continental or who elected Option 3 under the Continental-ALPA settlement. The O'Neill Group has pursued at least seven major matters in litigation against Continental since the announcement of the settlement:

(a) objections to Continental's motion to approve the settlement pursuant to Bankruptcy Rule 9019, which were denied by the bankruptcy court's December 27, 1985 Order Approving Settlement. The O'Neill Group's subsequent motion to alter or amend that approval order remains the subject of litigation. See Continental Airlines, Inc. v. O'Neill et. al, Civil Action No. 87-96 (S.D. Tex.), Appeal No. 89-2381 (5th Cir.);

(b) a dispute regarding application of the settlement to "resigned or retired pilots," Continental Airlines, Inc. v. O'Neill et. al, Civil Action No. 87-1092 (S.D. Tex.), Appeal No. 89-2383 (5th Cir.);

(c) a dispute regarding the impact of post-settlement mergers and the addition of "foreign pilots" to the Continental

pilot seniority list. *Continental Airlines, Inc. v. O'Neill et al.*, Civil Action No. 87-1089 (S.D. Tex.), Appeal No. 89-2384 (5th Cir.);

(d) a civil action in district court challenging the Continental-ALPA settlement as in violation of the Railway Labor Act. *O'Neill v. Continental Airlines, Inc.*, Civil Action No. 87-259 (S.D. Tex.);

(e) appeal from the bankruptcy court order denying pilots' bankruptcy claims for contract rejection damages, *O'Neill v. Continental Airlines, Inc.*, Civil Action No. 85-6151 (S.D. Tex.), Appeal No. 89-2347 (5th Cir.), for furlough pay.

(f) appeal from the bankruptcy court order denying pilots banking claims, *O'Neill et al v. Continental Airlines, Inc.*, Civil Action No. 86-3705 (S.D. Tex.), Appeal No. 89-2943 (5th Cir.); and

(g) pursuit of a lawsuit which ALPA had brought against Continental's parent, Texas Air Corporation, and which had been settled by ALPA as part of the Continental-ALPA settlement. *Texas Air Corp. v. Air Line Pilots Association*, Civil Action No. 84-530 (S.D. Tex.), Appeal No. 89-2455 (5th Cir.).

5. Strike-Related Violence And Misconduct. The two-year ALPA strike at Continental was exceptionally hostile and bitter. There were repeated incidents of harassment of passengers and working pilots by striking pilots, including an incident for which two striking pilots were convicted of federal felony offenses for possession of unlawful explosive devices, apparently intended for use in pipe-bombing the homes of certain working pilots. Continental also obtained injunctions against ALPA for harassment of working employees and passengers, and obstruction of access, in Houston, Dallas, San

Antonio, and San Diego. See Attachment D (copies of injunctions). Other strike-related violence included telephone death threats, arson of a working pilot's barn and another's home, the release of noxious odor bombs in Continental airport facilities in Houston and Denver, the jamming of aircraft communications systems, and hundreds of incidents of vandalism to the property of working pilots. Continental believes to this day, and alleged in a 1984 lawsuit claiming violations of the Racketeer Influenced and Corrupt Organizations Act of 1970, 18 U.S.C. § 961 et seq., (Attachment E), that this violence was sponsored, coordinated and financed by ALPA through a so-called Security and Intelligence Committee, otherwise known as a "dirty tricks" squad, which operated in secret and received and disbursed ALPA funds under a variety of aliases during the course of the strike, and whose purpose was to intimidate pilots who elected to cross ALPA's picket line, thereby shutting down Continental's operations. ALPA attached such a high priority to the strike that for almost two years it paid extraordinary strike benefits at the rate of \$3800 per month to striking Captains and \$2400 per month to striking First and Second Officers.

6. Bankruptcy Court Findings. The hostility between Continental and ALPA was carried forward in extensive litigation, beginning with ALPA's assertion that Continental had sought bankruptcy court protection for improper purposes. However, after a full evidentiary hearing, the bankruptcy court expressly found that:

Continental Airlines filed this proceeding only when management felt it had no acceptable alternative if it were to have a chance to keep the airline flying; the court further finds that there was no intent or motive to abuse the purpose of the Bankruptcy

Code. . . The primary purpose in filing these proceedings was to keep the airline operating so as to best utilize its going-concern value. The management of the company owed this obligation to its shareholders and to its creditors.

*In re Continental Airlines, Corp.*, 38 Bankr. 67, 71-72 (Bankr. S.D. Tex. 1984). There were also lengthy hearings over Continental's motion to reject the ALPA collective bargaining agreement, which resulted in the following findings regarding the "good faith" bargaining of the parties subsequent to Continental's filing for bankruptcy:

Continental's bargaining position appears reasonable to this court. . . On the other hand, this court is concerned that [ALPA] does not intend to reach agreement with Continental on terms the airline can afford. ALPA appears to have strong motives for seeing that the carrier is shut down as an example to other carriers whose pilots are represented by this large and extremely powerful union. . . ALPA's attitude further seems to be at odds with the spirit and purpose of the Bankruptcy Code.

Memorandum of Authorities Authorizing Rejection of Airline Pilots Association Collective Bargaining Agreements (Bankr. S.D. Tex. Wheelless, J.) (entered August 17, 1984) at 14-17.

Attachment F.<sup>2/</sup> This was the bitter context out of which the Continental-ALPA settlement arose.

7. System Bid 85-5. During the strike, Continental continued its long-standing practice of providing for future pilot staffing and training assignments by means of periodic System Bids.<sup>3/</sup> Such a bid allocates projected pilot positions among the pilots available for flight duty.<sup>4/</sup> In order to

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<sup>2/</sup> The bankruptcy court also rejected ALPA's allegations that "safety" was their major concern, finding:

ALPA was singularly unsuccessful in providing a scintilla of evidence to this court that safety is a genuine concern . . . or that there is substantial evidence of unsafe conditions on Continental's airplanes. . . ALPA's campaign is simply a scheme designed to further ALPA's efforts to close down Continental Airlines for its own economic purposes. . . this promotion by ALPA appears to be a misuse of the labor laws of this country.

Attachment F at 19.

<sup>3/</sup> System Bids have historically occurred at Continental from one to five times per year. In 1985 Continental had 5 System Bids; in 1986 it had one System Bid; in 1987 it had 3 System Bids; and in 1988 it had 2 System Bids. A "System Bid" is a long term pilot training and staffing plan, usually published at Continental four to six months to one-year in advance of its effective date, the deadline by which all pilots would be fully trained and in their new positions. The lead time between an award date and the effective date varies with the amount of pilot re-training expected to be required; each pilot usually assumes his new position as his training is completed.

<sup>4/</sup> The announcement of a System Bid projects future pilot staffing needs by base (geographic location) equipment (aircraft type) and pilot position (Captain, First Officer, Second Officer). The projections are based on scheduled aircraft deliveries (or dispositions), expected retirements or attrition, and marketing plans for expansion, contraction, or realignment of future flight schedules. Once a System Bid is announced, each Continental pilot "bids" his preferences for base, equipment and status, and the bids are awarded in seniority order, subject to a number of exceptions. The System Bid is then

(continued...)

maintain ongoing flight operations while re-training large numbers of pilots for new positions or equipment, such training must begin from the "bottom-up," i.e. the most junior pilots, Second Officers, must be relieved from active duty (or replaced by trained new hires) in order to be available for training to occupy the seats of First Officers, who then become available to be trained as Captains. A System Bid therefore identifies each pilots' "rightful place" and training requirements, thereby allowing implementation of a training schedule to ensure that each pilot who requires re-training will be trained and in position when needed. The pilot training system is even more complex when multiple aircraft types are involved and the availability of training facilities must also be considered in the scheduling process. Thus, although a particular pilot may not undergo training or occupy his new bid position for some time, his assignment is "locked-in" at the time the bid is awarded because the training and assignment of other pilots is done in reliance on his assignment. The use

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4/ (...continued)

"awarded", assigning each pilot to a specific base, equipment and position. Contrary to a premise of the panel opinion, the allocation of vacancies by seniority is not a "fundamental right," but historically a negotiable issue; vacancies at Continental have never been awarded "solely" on the basis of date of hire seniority, but pursuant to negotiated agreements which contain several exceptions to pure date of hire seniority. Those exceptions include (1) a freeze provision, whereby a pilot recently trained as a 727 Captain is "frozen" in that equipment for three years and cannot cross-bid to other comparable equipment which would require retraining; (2) provisions of the Seniority Integration Decision of a neutral arbitrator which merged the Continental and Texas International pilot seniority lists in 1983, which decision included ratio provisions and restricted bidding rights former Texas International pilots from bidding for certain pre-merger Continental equipment types; all based upon a pilot's "expectations" (Attachment G); and (3) the provisions of the Continental-ALPA settlement allocating Captain vacancies and allowing assignment of the initial base and equipment of a returning pilot.

of such bids is absolutely essential to ensure that an adequate number of fully trained pilots will be available to staff future schedules. On September 9, 1985, Continental posted System Base Vacancy Bid 1985-5. This bid, awarded on October 14, 1985, included 186 Captain, 194 First Officer and an undetermined number of Second Officer (due to aircraft acquisition uncertainties) vacancies, and had an effective date of November 1, 1986, the deadline by which all such positions would be occupied.

8. ALPA's Threats Of False Bids And Inside Job Actions. On September 15, 1985, while System Bid 85-5 was pending, ALPA informed the striking pilots that if they desired to return to work and participate in the bid they could do so without threat of union discipline or harassment, but emphasized that the strike would continue. ALPA issued a press release announcing that this new tactic was a "strategic maneuver," stated that its strike of Continental required a "non-traditional response," and further stated that "there is something to be said for having your people back on the property. It opens up new possibilities for achieving a solution once you have your foot in the door." Attachment H. At the same time, Continental became aware of statements by ALPA indicating that the returning strikers would act as a "Trojan Horse," positioning them for future slowdowns, sick-outs and other disruptive tactics. See Attachment I ("Two hundred reinforcements are on their way in . . . we've got our foot in the door and all we have to do now is kick the damn thing down."). Continental also received reports that strikers were being told to offer to return and submit bids, whether or not they actually intended to abandon the strike and report for training as scheduled, thereby severely disrupting Continental's pilot training program and its ability to staff its future flight schedule.

9. Striker Bids Rejected; Bid Awarded. ALPA's threats and the evidence Continental gathered caused Continental to question the bona fide nature of the bids and unconditional offers submitted by individual pilots between September 15 and 18, 1985. As a result, Continental rejected those offers and bids and filed suit in federal court challenging the legality of ALPA's entire course of conduct.<sup>5/</sup> See Attachment J. See also *Johns-Manville Products Corp. v. NLRB*, 557 F.2d 1126 (5th Cir. 1977) (where safety and integrity of operations may be affected by an in-plant strike or misconduct and the identity of wrongdoers is not feasible, an employer is justified in locking out all employees). ALPA's suggestion of possible false bids to disrupt the training schedule, or other "inside" job actions by returning strikers was an overriding concern to Continental at the time the Continental-ALPA settlement was negotiated in October 1985. The integrity and reliability of its flight schedule and the safety and convenience of the travelling public are the essence of Continental's business; it had a paramount business interest in protecting these interests against compromise by any or all returning strikers in the novel circumstances which existed in the Fall of 1985. System Bid 85-5 was in fact awarded entirely to working pilots

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<sup>5/</sup> Continental was concerned that a heavy concentration of strikers in selected bases and equipment (e.g. Los Angeles 727), would leave Continental's flight operation vulnerable to a job action from within (e.g. if striking pilots "packed" a specific base or piece of equipment, Continental would have no reserves or alternatives if most or all of those pilots elected to engage in a job action). It was ALPA's position at the time that, in the absence of a new contract, the ongoing strike and any other job action was legal. Moreover, I and other members of Continental's management, many of whom had formerly worked at Texas International Airlines, were well familiar with ALPA's use of slowdown tactics, which had to be enjoined there in 1980. See *Texas International Airlines v. Air Line Pilots Association*, 518 F. Supp. 203 (S.D. Tex. 1981). The leader of the TI pilots during that slowdown, Dennis Higgins, was the leader of the Continental striking pilots in September 1985.

(including over 400 previously returned strikers and nineteen strikers whose offers to return were made prior to September 15, 1985). In Continental's view, the positions on Bid 85-5 were properly and finally<sup>6/</sup> awarded.<sup>7/</sup> Thus, when negotiations ensued in October 1985, Continental--and the working pilots--were of the view that the positions awarded on that bid were no longer available as vacancies for returning strikers. Continental was fully prepared to vigorously defend its position.

10. Compromise of Litigation Re Bid 85-5. Resolution of the conflicting claims to positions on System Bid 85-5 was a central feature of the Continental-ALPA settlement. In order to reach a settlement, Continental and ALPA agreed to share the Captain vacancies on Bid 85-5 between "working pilots"<sup>8/</sup> and "striking pilots" on a negotiated

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<sup>6/</sup> It is Continental's long standing practice and policy, dating from prior to the strike, that a vacancy is filled as soon as a pilot has been awarded it, even if the pilot is not trained for and advanced into the position until months later. A major reason for this policy is the "domino" or "ripple" effect which would be created if assignments were changed once the training cycle has commenced; training which had been done by that time could be wasted, and the scheduling of further training delayed, by the secondary reassignment of all affected pilots to a new "rightful place" on the bid assignments.

<sup>7/</sup> System Bid 85-5 was the subject of litigation which was settled under the Order and Award. *Air Line Pilots Association v. Continental Airlines, Inc.*, Civil Action No. 85-5203 (S.D. Tex.). The O'Neill Group subsequently sought to intervene into that litigation; intervention was denied and the case was dismissed, but was never appealed by the O'Neill Group. Attachment K. In Continental's view, such claims are now barred.

<sup>8/</sup> The "working pilots" included approximately 200 veteran pilots who never struck and over 400 formerly striking pilots who had previously returned to work. The panel opinion seems to presume, erroneously, that strikers returning under the settlement were necessarily senior to the working pilots

(continued...)

formula basis which included a fixed timetable for the advancement of returning pilots to Captain positions, including pay guarantees in the event the timetable could not be met. In exchange, ALPA agreed to a 1:1 ratio for allocating future Captain vacancies between returning and working pilots. This allocation method was modeled on an arrangement common in airline mergers, and had previously been used in the 1983 pilot seniority integration following the merger of Texas International Airlines into Continental (which was conducted pursuant to ALPA's published Merger Policy in effect at the time). See Attachment G. It was, as the Court describes it, a "dovetailing" of the two groups of pilots, but only for purposes of allocating Captain vacancies; once in their assignments all pilots exercised their full seniority, thereby entitling more senior returned pilots to their preferences as to monthly work schedules, vacations and similar matters. Continental continues to believe that this was not discrimination at all but was a reasonable compromise.

11. Order of Recall. It was Continental's consistent practice throughout the ALPA strike that striking pilots who made an unconditional offer to return to work were recalled, when vacancies were available, in the order in which their offers to return were made, not in seniority order. The Continental-ALPA settlement continued this practice for those pilots who desired to return to work, but who elected not to settle their claims (i.e. Option 3 pilots). See Attachment A at §I.B.1. Those pilots who desired to return to work but elected to settle their claims pursuant to the settlement (i.e. Option 1 pilots) were recalled in seniority order as if they had made an unconditional offer to return as of September 15,

8/ (...continued)

with whom they were ratioed for future Captain vacancies; this was not necessarily true.

1985. Id. The panel opinion suggests that there is some evidence in the record that Continental somehow indicated to ALPA on September 15, 1985 that it would return strikers to work in seniority order if the strike were terminated. I am confident that Continental made no such offer or statement. While the panel opinion points to the post-strike recall of mechanics and flight attendants in seniority order, apparently no party alerted the Court that mechanics and flight attendants are already trained, or easily trained, on all aircraft types and are therefore fungible. Pilots, in contrast are required by FAA regulations to be trained and qualified at substantial expense, for a specific aircraft type. Thus, it would have been in Continental's business interest for Continental to have recalled striking pilots based on their qualifications for available positions. While it was in Continental's interest to re-train such pilots when pilots were scarce and its operations were growing, that would not have been the situation following Bid 85-5 and termination of the ALPA strike.

12. Continental's Pre-Settlement FAA-Approved Pilot Training Manual. The panel opinion correctly notes that the settlement required returning pilots to fly for four months as First Officers before assuming Captain positions. The Court was apparently not made aware that this reflected Continental's pre-existing, Federal Aviation Administration required and approved pilot training program, which included a requirement that any pilot who was absent from a Continental cockpit for more than 24 months had to serve at least four months as a co-pilot before assuming a Captain's position. Attachment L. Under Federal Aviation Regulations, Continental could not have changed that requirement without FAA approval. 14 C.F.R. § 121.405.

13. Continental Did Not Assign Rank or Pay Status. Contrary to the statement in the panel opinion at p. 448,

Continental had no voice or discretion in determining a returning pilots' rank (which determines pay status). Because of Continental's concern about in-plant strikes and work slowdowns, see supra at ¶ 5-6, Continental negotiated the right to "assign" the initial base and equipment (but not the rank or pay status) of any returning pilot in his initial assignment upon return, or in his initial assignment as a Captain. In contrast, the rank of a returning pilot was determined objectively on the basis of available vacancies upon his return and upon the pilot's place in the sequence of returning pilots. Continental's right of assignment for base and equipment was temporary, it expired as to each returning pilot upon the next System Bid following his return to work or following his first service as a Captain. Continental voluntarily waived its right of assignment in the Fall of 1987.

14. No Equipment Freeze Applied To Assigned Pilots. As a Continental representative testified without dispute in bankruptcy court proceedings in December 1986, provisions of the Pilot Employment Policy relating to equipment freezes applied only to pilots who had bid for assignment to new equipment which required training; such equipment freezes have never been imposed upon pilots returning pilots who were assigned to a type of equipment--such pilots were free to bid their seniority on the next System Bid. Attachment M.

15. Severance Payments. The settlement provided a severance option ("Option 2"), which 366 pilots elected. Those pilots received a total of \$17.3 million, an average of over \$47,000 per pilot. Approximately 20 Option 2 pilots received over \$100,000 each, based upon the formula of \$4,000 per year of service. Continental filed two verified reports detailing the amount of severance due to pilots electing Option 2, and served copies of those reports on both

ALPA and the O'Neill Group. Attachment N. Contrary to the statement in the panel opinion at p. 449, the settlement contained no cap on Continental's overall exposure to severance pay. The \$2.6 million "cap" referenced in the Court's opinion relates only to a maximum amount of severance available to a small sub-group of striking pilots, i.e. those pilots "who were not drawing ALPA strike benefits as of September 15, 1985 and were not on furlough status as of September 24, 1983[.]". See Attachment A at § II.A.2 (p. 14-15) (emphasis added). The great majority of striking pilots were receiving ALPA strike benefits as of September 15, 1989.

16. Pilot Wage Claims Were Paid; Not Waived. Contrary to the panel opinion, at p. 448, the settlement also provided that Continental would pay to all pilots, regardless of their option election, 100% of their "hard" claims, which included (1) unpaid pre-petition wages, (2) unpaid pre-petition medical and dental expenses, (3) accrued but unused vacation and (4) reimbursable pre-petition expenses, subject only to a final determination of the amount due by the bankruptcy court. Id. at S II.C (pp. 18-19). The settlement did provide that pilots electing Option 1 or 2 would waive any litigation and other "soft" claims. Id. At the time of the settlement, however, most such claims, including striking pilots' claims for contract rejection damages had already been disallowed by the bankruptcy court. See Orders attached hereto as Attachment O.

I declare under penalty of perjury that the foregoing statements are true and correct.

Executed on November \_\_, 1989.

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Donald J. Breeding

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE SOUTHERN DISTRICT OF TEXAS  
HOUSTON DIVISION

CASE NO.

IN RE: 83-04019-H2-5

CONTINENTAL AIRLINES CORPORATION

DEBTOR

IN RE:

CONTINENTAL AIR LINES, INC. 83-04020-H1-5

DEBTOR

IN RE:

TEXAS INTERNATIONAL AIRLINES, INC. 83-04021-H3-5

DEBTOR

IN RE:

TXIA HOLDINGS CORPORATION 83-04022-H3-5

DEBTOR

CONSOLIDATED CASE NO.

83-04019-H2-5

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August 17, 1984

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MEMORANDUM OF AUTHORITIES  
AUTHORIZING REJECTION OF AIRLINE PILOTS  
ASSOCIATION COLLECTIVE BARGAINING AGREEMENTS

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On September 24, 1983, Continental Airlines Corporation ("CAC"), Continental Air Lines, Inc. ("CAL"), Texas International Airlines, Inc. ("TXI") and TXIA Holdings Corporation (collectively "Continental") filed simultaneous Chapter 11 proceedings under Title 11 of the United States Code. On the 27th day of September, 1983, Continental filed a motion to reject the collective bargaining agreements with the Airlines Pilots Association ("ALPA"), the Union of Flight Attendants ("UFA"), the International Association of Machinist and Aerospace Workers ("IAM"), and the Transport Workers Union ("TWU").

On the 11th day of October, 1983, the unions filed a joint motion to dismiss the Continental Chapter 11 proceedings on the ground that the proceedings were not filed in good faith; alleging that the sole or the primary purpose of Continental in filing its proceedings was to reject the union contracts. After an extensive hearing, this court denied the joint motion to dismiss.

By agreement of the parties, the evidence introduced at the hearing on the motion to dismiss was included in the record on the motion to reject the employee agreements. The court adheres to the findings made in that decision.

The taking of evidence on the motion to reject commenced on January 30, 1984. This was over four months after these proceedings were filed but was the earliest this court's calendar would permit it to undertake this lengthy hearing. With some interruptions, the presentation of evidence continued until April 27, 1984. At the conclusion of the debtor's evidence, the court took under advisement the motion of the TWU to enter judgment denying rejection of the collective bargaining agreements with the Transport Workers Union. In addition, to some extent, the question of rejection of the various agreements with the IAM is being

treated separately. The court has not yet issued a ruling with respect to the UFA agreements.

Continental shut down its domestic operations at filing but restated them on a substantially reduced basis on September 27, 1984.

Immediately upon the filing of this proceeding on September 24, 1983, Continental Airlines implemented "Emergency Work Rules" with respect to each of the four involved unions. These constituted unilateral changes in pay, benefits, work rules and conditions. On or about that date, Continental transmitted copies of the emergency work rules to each union by a letter indicating that these emergency work rules were just that and that they also constituted an offer to each of the unions to negotiate a new agreement. These cover letters refer to the fact that certain issues were omitted from the provisions in the rules. After receipt of these emergency work rules, ALPA and UFA went on strike (beginning October 1, 1983) without undertaking any negotiations with Continental over the emergency work rules or any new agreement based on Continental's then-existing status. Both of these unions have been on strike since that date; although a number of negotiating sessions have since taken place.

The IAM and Continental had already bargained to an impasse, which was declared effective July 13, 1983. On August 13, 1983, the IAM went on strike; whereupon Continental Airlines implemented "Interim Work Rules" which were subsequently amended on September 12, 1983. These interim work rules were replaced on September 24, 1983, by the emergency work rules applicable to the remaining IAM employees of Continental.

For the reasons set forth below, this court has determined that the equities favor the debtor and its estate, that the contracts with the Airline Pilot Association are onerous and burdensome and that such agreements must be rejected in order for Continental to have an effective reorganization. This rejection is pursuant to the provisions of 11 U.S.C. § 365 and under the principles enunciated in the case of *NLRB v. Bildisco and Bildisco*, 104 S. Ct. 1188 (1984) decided February 22, 1984, during the evidentiary presentation in this case. That case was decided under the National Labor Relations Act. This court determines that the same reasoning and rationale are applicable to this case, which is decided under the Bankruptcy Code and the Railway Labor Act, 45 U.S.C. 151, et seq.

#### FACTS

Effective in 1978, the United States Congress, in its wisdom, determined that the airline industry should be deregulated to promote greater competition with respect to routes and fares, to allow more ready access of new entrants into the industry and to add flexibility of all airlines to enter new and existing markets and to charge what the traffic would bear, so to speak. Congress took this action despite the protests of the existing airlines, ALPA, the IAM, and other interested parties, who predicted that deregulation would result in financial difficulty for many of the carriers and bankruptcy or mergers for some and that this would cause displacement of many employees.

The aims and goals of the U.S. Congress in deregulating the airline industry appear to have been realized. Airfares have decreased dramatically in areas where the particular airline involved has not had substantial control over the market. Many new airline companies have entered into the marketplace and now compete directly with Continental

Airlines and the other airlines in the industry. In order to offset this increasing competition, Continental sought to increase its marketing efficiency by resorting to a "hub and spoke" operation; utilizing Denver and Houston as its operational hubs. While this has had some substantial beneficial effect on Continental's operations, this benefit was not sufficient to offset the fare advantages resulting from lower labor costs enjoyed by the new entrants in Continental's market. The lower labor cost of these new entrants resulted from the lack of historically based labor agreements which had escalated during the regulated period, before 1978, when the airlines could pass these increased costs on to the consumer. In this regulated atmosphere of the airline industry pre-1978, the self preservation instincts of the carriers were mitigated against and they thus did not have adequate incentive to resist the persistent and determined negotiating techniques of the powerful unions in the airline industry, such as ALPA and the IAM.

These unions have historically (and effectively) used the last highest contract as a stepping stone for each new negotiation. The result has been higher and higher wage rates and better and better provisions for the employees relating to work terms. There is no question that these unions did an outstanding job on behalf of their membership in this regard. This trend of higher and higher labor costs (negotiated by these unions) continued even after deregulation by virtue of these same techniques. No doubt upward inflation during this same time was a factor in these negotiations. The result, however, was a complex system of work rules which operated less and less efficiently for the airlines but which generated more and more time off and higher pay for the members of these unions. The additional and more unfortunate result was that it made a high and inflexible labor cost system for the major carriers coming out from the nurture of regulation. This caused many of them to be less competitive with the new

entrants who were making increasing incursions into their markets.

This was particularly true of Continental Airlines, whose hub systems in Denver and (particularly) in Houston competed directly with many of these new entrants. Not being fettered with the expensive and inefficient collective bargaining agreements of the older airlines, these new entrants<sup>1/</sup> could hire pilots, mechanics, and flight attendants in the open labor market at substantially lower prices than those that had been negotiated by Continental's labor unions. Labor is a major factor in the cost of operating an airline and is one in which there can be material variances from airline to airline. These new entrants could charge substantially lower fares than the older more established airlines, and their cheaper labor costs gave them a substantial competitive advantage over other airlines, including Continental. Continental did not have substantial control over its markets and does not now.

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<sup>1/</sup> Southwest Airlines had not been subject to regulation because it was an intrastate carrier before deregulation. Its labor costs have been traditionally lower. Thus while Southwest is not a "new entrant" in some respects, it is in others, since it has materially expanded its markets since deregulation. Its labor costs have been low, and it has run Continental out of at least one market with its lower fares. It is highly competitive with Continental in other markets. For convenience it will be included within the term "new entrants" in this opinion.

As a result, Continental lost substantial sums of money after deregulation. Up to September 24, 1983, the date of filing of the Chapter 11 petition, Continental had lost \$521,900,000 as follows:

|                      |         |                      |
|----------------------|---------|----------------------|
| 1979                 | lost \$ | 27.4 million         |
| 1980                 | lost    | 76.8 million         |
| 1981                 | lost    | 138.6 million        |
| 1982                 | lost    | 119.9 million        |
| 1983 to September 24 | lost    | <u>159.2 million</u> |
|                      |         | \$521.9 million      |

Although there were other factors, the main cause of Continental's losses was, as noted, that its higher labor costs prevented it from effectively competing with the low cost new entrants which have been significantly increasing their activity in Continental's markets. Continental did not have the benefit of some of the advantages enjoyed by some of its larger competitors such as United Airlines and American Airlines.

An expert employed by the Trade Creditors Committee testified that all of the major airlines are seeing "the handwriting on the wall" and are negotiating, or have negotiated, important concessions with their respective labor forces. Some have obtained significant reductions in their labor costs from those stipulated by their existing collective bargaining agreements. It was forecast that unless the major carriers eventually reduce their labor costs to the level of the new entrants, they will not survive.

Continental negotiated from time to time during the year of 1983 attempting to obtain concessions from its various unions.

During its disastrous summer of 1983, and prior to filing its Chapter 11 proceeding, Continental Airlines attempted to

negotiate a \$60,000,000 cost concession from the Airline Pilots Association (on an annual basis) and sought a \$40,000,000 annual concession from the Flight Attendants, \$20,000,000 from the International Association of Machinist and an additional \$30,000,000 from its other (non-union and managerial) employees.

While the Airline Pilots Association members indicated that they were "players", nevertheless, they never committed to the requested \$60,000,000 in cost concessions nor to any other number prior to the filing of the Chapter 11 proceeding. After the filing, ALPA offered concessions of approximately \$30,000,000 on an annual basis, or about half what Continental had indicated it needed from the pilots to break even before the filing of the Chapter 11 proceeding.

After the filing, Continental immediately cut back on a number of its routes and a substantial number of the flights that it had been flying. It shut down the airline from September 24 until September 27, 1983, except that it continued to fly its international routes for fear these lucrative concessions might be lost. Continental was also fearful of the domestic flights being shut down for any longer period. Its position is that it was concerned that it would lose public acceptance and that it might never fly again; at least most certainly not without substantial cost to creditors, shareholders, and all concerned, including employees.

Continental scaled back its cost structure in order to provide high quality service on a fare structure competitive with the new entrants. It appears to have been somewhat successful at this marketing technique to date; although it is not yet known what effect there will be if a full scale fare war should be engaged in by a substantial number of its competition. Nor is it known what the full effect of additional competition will be from carriers now entering the field,

including the "New Braniff", which began flying during the spring of 1984 during the evidentiary presentation in this case.

### REASONABLE EFFORTS

The Supreme Court in *NLRB v. Bildisco and Bildisco*, supra, (hereinafter "Bildisco") required that before acting on a petition to "modify or reject" a collective bargaining agreement, the bankruptcy court should be persuaded that reasonable efforts to negotiate a voluntary modification have been made and are not likely to produce a prompt and satisfactory solution. The purpose of this is to serve the policies (if not the letter) of the Labor Act<sup>2/</sup>. However, the bankruptcy court is not required to determine that the parties have bargained to impasse nor to make any other determination outside the field of its expertise.

The unions assert that the involved principle requires the bankruptcy court to hear evidence and pass on the substantive details of all relevant negotiating sessions. This is part of an effort to show that Continental acted unreasonably in the substance of its proposals to the respective unions. The thrust of this theory is to place the bankruptcy court in the posture of determining what the parties should agree to and in what respect the company offers vary from this standard.

It is precisely this kind of inquiry which this court understands that *Bildisco* (and prior cases) determined that this court should avoid. *Bildisco* pointed out that the national labor policies of avoiding labor strife and encouraging collective bargaining generally require that employees and unions reach their own agreements on terms and conditions of

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<sup>2/</sup> In that case it was the National Labor Relations Act ("NLRA") 29 U.S.C. 158 et seq. This case involves the Railway Labor Act ("RLA") 45 U.S.C. 151 et seq.

employment free from governmental interference. In addition, the Court observed that a determination that the parties have bargained to impasse is one ordinarily made by the National Labor Relations Board and that to involve the bankruptcy court in that kind of determination would divert the bankruptcy court to an area outside its area of expertise. See also *American National Insurance Co. v. NLRB*, 187 F.2d 307, page 310 (5th Cir. 1941), affirmed 343 U.S. 395, page 404 (1952).

The labor agreements with ALPA, UFA & IAM are complex and the resulting cost of virtually each provision is difficult of ascertainment, partly because it varies substantially with each level of flying operation. Asking this court to pass on the merits of the respective offers would impose on the bankruptcy court a substantial burden in areas far removed from any expertise this court might have.

It is the opinion of this court that it is not intended by the Supreme Court that the bankruptcy court examine the substantive merits of the negotiations to determine whether the parties respective proposals are reasonable but rather only that a genuine effort has been made to reach agreement with the certified representatives of the employees. In the same phrase, the Supreme Court required this court to determine as well that "such efforts are not likely to produce a prompt and satisfactory solution." In other words, if a genuine effort has been made by the debtor to reach agreement and this effort is not likely to produce a prompt solution under all the existing circumstances, the court is authorized to act on the debtor's motion to reject. Of course, this duty of the debtor to recognize the bargaining representative and to continue bargaining exists both before and after any rejection is permitted.

The *Bildisco* court avoided using the terms "good faith" and "bad faith" bargaining; traditional terms in labor negotiations and labor law. Presumably this was intentional. Perhaps this is an indication that the Supreme Court intends for the Bankruptcy Court to stay out of even that area of determination. The "good faith - bad faith" determination is simply a determination of whether or not a party has a desire to reach an agreement at all. It requires some assessment of the substantive terms of an offer, as well as the willingness to bargain and the effort to do so. *NLRB v. Herman Sausage Co.*, 275 F.2d 229 (5th Cir., 1960). However, even a "good faith - bad faith" determination is far less of an intrusion into the bargaining rights of the parties than a determination of whether the substantive terms of a proposal are "reasonable".

The Supreme Court has noted that great caution should be used in finding bad faith in cases other than wherein there is a "desire not to reach agreement", for doing so risks infringement of the strong federal labor policy against governmental interference with the substantive terms of collective bargaining agreements. *Chicago & Northwestern Railway v. United Transportation Union*, 402 U.S. 570 (1971). The Fifth Circuit has ruled to similar effect in many cases, including *Gulf State Manufacturing, Inc. v. NLRB*, 579 F.2d 1298 (5th Cir. 1978), aff'd in pertinent part 598 F.2d 896 (5th Cir. 1979) (en banc).

In addition to this strong policy against such determinations by a court, the burden on the bankruptcy court to make an inquiry into the reasonableness of the terms of offers (as suggested) would appear to be excessive. This court has allowed this type of evidence in this proceeding because of some of the uncertainties in the law that existed at the time of this hearing. The result has been that the hearing lasted almost three months. No doubt future case law will give the Bankruptcy Courts guidance with respect to this issue as to

future hearings on applications to reject collective bargaining agreements.

Be that as it may, this court allowed detailed evidence concerning the substance of numerous bargaining sessions which occurred both before and after the filing of the Chapter 11 petition on September 24, 1983. This was at a great cost of court time and may have consumed as much as half or more of the hearing time. From this evidence, the court concludes (1) that Continental has made considerable and reasonable effort to reach agreement with the unions involved herein for voluntary modification of their respective bargaining agreements, (2) that Continental has bargained in good faith with respect to those efforts, (3) that no agreement has been reached and (4) that those efforts are not likely to produce a prompt and satisfactory solution. It is the intention of Continental to reach agreement with these employee groups consistent with its current economic situation. It has made numerous attempts to do so.

That Continental continued to urge in its bargaining session that it must maintain its labor cost levels at or about those provided for in the emergency work rules does not constitute bad faith negotiation under all of the circumstances of this case. It is not bad faith for a party to insist on the terms of a proposal and to maintain that posture. "Open mind need not mean a mind without conviction nor need it mean a mind easily swayed by argument." It need not make a proposal or require the making of a concession. *American National Insurance Co. v. NLRB*, supra, page 309.

A party may try to achieve its objectives and need not yield. *NLRB v. Tomco Communication, Inc.*, 567 F.2d 871, 884 (9th Cir. 1978). It may even withdraw an earlier offer, including a tentative agreement on certain provisions, if circumstances change. *NLRB v. Randle-Eastern Ambulance*

*Service, Inc.*, 584 F.2d 720 (5th Cir. 1978). A position taken in good faith need not be abandoned or compromised. The debtor is entitled to insist on a proposal, however unacceptable to the union, and if the insistence is genuinely and sincerely held it may be maintained even if it procures a stalemate. *NLRB v. Herman Sausage Co.*, 275 F.2d 299 (5th Cir.), rehearing denied 277 F.2d 793 (5th Cir. 1960), see *American National Insurance Co. v. NLRB*, supra, page 309 n.3.

The unions' position that a party must ask for more than it wants in order to meet somewhere in the middle is not accepted by this court. That was urged as being the traditional method of negotiating. However, the facts in this case show that this is not the traditional situation facing negotiators. This is especially true where, as here, Continental has been in extreme financial difficulty and needed prompt modification of its collective bargaining agreement.

Having just filed a Chapter 11 proceeding and being the first air carrier to attempt to fly through such a proceeding, Continental was in a period of uncertainty and needed the flexibility allowed it by the so called emergency work rules promulgated September 24, 1983, immediately upon filing the proceeding. As noted, Continental substantially cut back on the number of cities it served and the number of flights to the cities it continued to serve. It substantially reduced its work force. At the present time it is facing increasing competition from even additional new entrants coming into the market since the filing of this proceeding. It is just now approaching profitability but may be faced with a fare war in the near future. Under the existing circumstances, Continental's bargaining position appears reasonable to this court. Although it severely cut back the wage levels and liberalized its working rules, it somewhat patterned these after those of other airlines with which it was then in competition. Over half of the union

membership in each category has crossed the picket lines and come to work for Continental under the terms of the emergency work rules (eighty percent in the case of Flight Attendants) as have newly hired personnel<sup>3/</sup>.

In *Neon Sign Corp. v. NLRB*, 602 F.2d 1203 (5th Cir. 1979), the Fifth Circuit found that an employer engaged in good faith bargaining even though it insisted on wage decreases. The company was experiencing serious financial problems and lower wages were essential to its survival.

That the proposals submitted by the company were for provisions similar to those agreed to by the same union at other companies is evidence of the employer's good faith. See *NLRB v. American National Insurance Co.*, 343 U.S. 395, 405 (1952); *Gulf State Manufacturers v. NLRB*, supra.

That the unions have not accepted Continental's proposals does not in and of itself mean that they are unreasonable or that they are not attempting to reach agreement with Continental. Indeed, the concessions that are being asked of the pilots, the flight attendants, and others is substantial and greatly affects a standard of living to which many of them have become accustomed. This is a difficult idea to adjust to. Nevertheless, herein, the purposes of the National Labor policy have been well served. Bargaining by the debtor with its unions has been going on for well over a year. No agreements could be reached with the IAM and an impasse was declared. No agreement has been reached with ALPA or UFA.

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<sup>3/</sup> Some of the jobs subject to the IAM agreements were eliminated because Continental could (and did) contract these services out to third parties at cheaper rates than the IAM contract specified (i.e., cabin cleaners, fuelers, flight kitchen personnel, etc.).

Prior to September 24, 1983, the terms offered the respective unions were better than those required by the debtor post filing. Yet no agreement could be reached on those terms. Just before filing, Continental made major presentations directly to its employees in order to reach agreement on concessions which this court finds were necessary for it to survive, but the unions (except TWU) did not agree. A great deal of negotiation has taken place since filing. To require further bargaining at this level before acting on the motions to reject seems to this court to be unrealistic and useless.

Indeed, the failure of the court to act at this stage of the proceeding (two months after the substantial evidentiary hearing concluded) may be impeding eventual agreement. As noted above, the parties have a continuing duty to bargain even after rejection. If agreement is to be reached, it will occur after the issue of the rejection of the agreements has been determined. Perhaps this and the improving income posture of the debtor will allow agreement to be reached in the future.

On the other hand, this court is concerned that the Airline Pilots Association does not intend to reach an agreement with Continental on terms the airline can afford. ALPA appears to have strong motives for seeing that the carrier is shut down as an example to the other carriers whose pilots are represented by this large and extremely powerful union. It represents pilots throughout the airline industry in the United States. Other carriers are having difficulty in the post-deregulation period and are requesting concessions from their pilots. The obligations of ALPA to its other (non-Continental) members would make it difficult for this union to recommend settlement with Continental to the extent needed by Continental in order to lower its labor cost sufficiently for it to be competitive in its fare levels and to return to

profitability. Outside of the courtroom, ALPA has asserted "we must continue to apply whatever pressures are required to preclude New CAL [from] operating profitably. These pressures will include both economic sanctions and all legal action open to us. . . ." In the courtroom, ALPA has verified that its purpose is to shut down Continental. The Airline Pilots Association has made it clear, and has convinced this court, that its primary aim is to shut down Continental Airlines.

While ALPA's actions (to the extent they are legal) may be allowed by prevailing labor laws, wherein they are a means to achieve an agreement, it appears to this court that other motives are involved, at least in part. Thus ALPA's actions to shut down Continental and/or to deprive it of profitability reflects on ALPA's good faith in bargaining and on any equities involved. ALPA's attitude further seems to be at odds with the spirit and purpose of the Bankruptcy Code.

ALPA has maintained that its three principal areas of concern are (1) preservation of the union as the bargaining representative of Continental's pilots (union security), (2) safety and (3) seniority. It also contends that Continental has bargained unreasonably by failing to agree with ALPA's proposals.

Continental has at all relevant times recognized ALPA as the bargaining representative of its pilots, although it has not honored the "dues checkoff" provision of the collective bargaining agreement since the strike began.

### THE "SAFETY" QUESTION

The evidence in this case shows that ALPA has publically indicated that it and its members are vitally concerned with the safety of the public flying on Continental Airlines since the October 1, 1983 strike. The pilots failed to mention that most of the pilots employed by Continental are those off of ALPA's seniority list (i.e., are ALPA pilots). The newly-hired pilots must go through required training and must be qualified. That some may be less experienced does not of itself indicate lack of ability. In addition, the court would note that safety is the responsibility of the Federal Aviation Agency, who must revoke or suspend the certificate of Continental Airlines should Continental not adhere to the safety standards imposed by this federal agency.

In short, while crying "Safety! Safety!" in the courtroom and to the public, ALPA has filed in its meager attempt to offer evidence that Continental Airlines is unsafe to fly. It has offered almost no evidence of this to this court, and has apparently failed to convince the FFA, in whose jurisdiction and responsibility lies the safety of all airlines, including Continental.

ALPA was singularly unsuccessful in providing a scintilla of evidence to this court that safety is a genuine concern on the part of the pilots or that there is substantial evidence of unsafe conditions on Continental's airplanes<sup>4/</sup>.

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<sup>4/</sup> Were ALPA genuinely concerned over the public's interest, it has it within its power to release some of its striking pilots back to Continental to help fill its pilots needs. Continental has requested this. It would have prevented further erosion of Continental's seniority list - an issue in the settlement negotiations. ALPS is under no obligation to do this but its failure to do so upon request is indicative of the fact that self interest is its true motive in this endeavor; not that of the public.

This court has concluded that ALPA's campaign is simply a scheme designed to further ALPA's efforts to close down Continental Airlines for its own economic purposes. Among other things, this would act as a warning to other carriers who must deal with ALPA at the bargaining table in other areas.

Based on the evidence offered to this court, this promotion by ALPA appears to be a misuse of the labor laws of this country. In any event, the court declines to deny rejection on the basis of ALPA's claim that safety is at stake.

#### THE SENIORITY ISSUE

Some of the major provisions of the collective bargaining agreements by and between Continental Airlines and the Airline Pilots Association (including the old Texas International agreement with ALPA) relate to seniority. These are very sensitive and important provisions for the pilot employees (as well as the other union employees with respect to their respective collective bargaining agreements). ALPA and the other unions argue that Continental Airlines has not been reasonable in its efforts to settle because of Continental's position with respect to the relative position of "new hires" that have been employed since the pendency of this proceeding and after the strikes of Continental's major unions, including ALPA.

The unions further argue that the seniority provision of the contract is a non-executory right which has become "vested" in the pilots and therefore cannot be rejected under the provisions of § 365 of the Bankruptcy Code. This court disagrees.

There is no precise definition of "executory contract" in the Bankruptcy Code. At least one of the accepted

definitions of the term "executory contract" is a contract that is so far unperformed on both sides that the failure of either party to complete performance would constitute a material breach excusing further performance of the other. *Matter of Tonry*, 724 F.2d 457 at page 468 (5th Cir. 1984). See *Countrymen, Executory Contracts and Bankruptcy*, 57 Minn. L. Rev. 439 (1973); 58 Minn. L. R. 479 (1974) and House Report No. 95 - 595, page 347 (1977); Senate Report No. 95 - 989, 2d Sess. 58 (1978), 2 Collier on Bankruptcy § 365.02 (1983).

Even though a pilot may have achieved a certain level of seniority within the meaning and under terms of the collective bargaining agreement between ALPA and Continental, nevertheless, the right of employment at Continental by any particular pilot is not absolute. In order to enjoy the use and benefit of any seniority position, the pilot must be employed by, and perform services for, Continental Airlines. It is therefore clear that under the collective bargaining agreement both Continental and each employed pilot have reciprocal obligations during the life of the contract. In other words, performance is due by both parties. This is likewise true for every other employee that has seniority under a collective bargaining agreement. Thus, under the Bankruptcy Code, such a provision is executory, at least insofar as the right of a striking pilot to return to work after the strike is settled.

Under the Continental - ALPA collective bargaining agreements, pilots were entitled to be placed on the seniority list and to maintain their relative status thereon (absent other agreement) under the terms and conditions of the agreement. As a pilot went higher on the seniority list, he had the privilege of being recalled, or his employment maintained, in priority to pilots lower on the seniority list. In addition, as changes were made in the system such as routes, equipment, bid runs, vacations, etc., the higher the seniority the higher the

priority for the pilot to have his choice in these areas. Furloughs were made from the bottom of the seniority list. Further, after pilots are furloughed, under the agreement they were recalled in order of seniority. Often this required extensive retraining by Continental, wherein a pilot changed type of equipment or was out of service beyond a specified amount of time.

When Continental filed its proceeding and drastically cut back on the number of cities it served and the routes it was flying to the remaining cities, Continental had to furlough a number of pilots on the payroll. Continental immediately went on a campaign to get the remaining pilots to agree to fly under the emergency work rules. Once the strike began on October 1, 1983, Continental maintained a telephone "bank" in which pilots were called and requested to fly for Continental notwithstanding the strike. Those that did return to work filled the positions then available and, once recalled, maintained their relative priority they enjoyed on the seniority list pre-petition. Therefore, the relative seniority of working pilots is not the issue as this seniority is being honored by Continental.

For a period of time after the strike, Continental attempted without success to reach agreement with ALPA on the terms of a new collective bargaining agreement. As the early initial chaotic days of filing passed and Continental began to rebuild its system, Continental needed additional pilots and made a strenuous effort to get striking pilots to return to service. There was some success in this area, but as Continental expanded its routes it was unable to fill out its list of needs from the ALPA pilots then on strike. By instructions from its chief operating officer, Continental delayed hiring pilots not on the seniority list ("new hires") until it felt it had to do so to service its re-expanding route system. Continental did not undertake employing new hires

(pilots off their existing seniority list) without adequate warning to the Airline Pilots Association and its membership. ALPA was told on October 5, 1983, that replacements would be hired if the strike was not over quickly, and Continental sent letters to this effect to all of its pilots. Continental told all of its active pilots that it would not displace working pilots in the future to accommodate returning strikers. Striking pilots had the opportunity to return to work with Continental as it expanded its operations, but many declined to do so, although more than 50% of its pre-petition pilots did return to work.

After Continental reached the conclusion that it had to employ new hires, and began doing so in early November, 1983, it advised these new pilots that they were permanent and would not be replaced by striking pilots returning to work at Continental after the strike ended or upon each striking pilot's individual decision to cross the picket line. That permanent replacements would be hired if the striking pilots would not return was well known to ALPA and its membership long before Continental undertook this practice. Subsequently, since early November, 1983, as pilot positions were available in the system, Continental has hired all pilots off the seniority list who were willing to return (which pilots have continued to enjoy their relative seniority position) and has hired new pilots from outside its seniority list. As noted, once employed, the seniority system has functioned for each pilot as it did before the filing of these proceedings. As noted, once employed, the seniority system has functioned for each pilot as it did before the filing of these proceedings. Had Continental not employed pilots who were not on its seniority list the airline would have had to significantly limit its operations. This would have served ALPA's purposes but it would have made Continental's ability to reorganize substantially less likely. It was necessary to hire these

replacements in order for Continental to discharge its duty to the public to make a reasonable effort to continue flying.

However, in efforts to negotiate a settlement, ALPA has pointed its finger at Continental for refusing to agree on a "back to work" agreement under which the striking pilots would return to work and would resume their old relative seniority positions ahead of any newly-hired pilots (who would naturally have lower seniority status in most, if not all, situations). Such an agreement would result in Continental's furloughing most, if not all, of these new hires, despite express promises to these individuals that they would not do this. ALPA says that Continental, by not so agreeing is bargaining in bad faith and/or is unreasonable.

Continental has maintained that it will take returning pilots only to the extent that positions are (or become) available and will not agree to "create" positions for returning strikers by furloughing new hires.

Continental defends its position by urging to the court that it has a legal obligation (the oral representations and agreement) to the individual new hires as well as a moral obligation. Continental further argues that if it agreed as ALPA has suggested, the resulting furloughs of the new hires would put Continental in a bad bargaining position with respect to any future negotiations that might take place between ALPA and Continental within the next several years. Continental argues that its position does not constitute bad faith bargaining and is entirely reasonable under the circumstances.

Should an agreement be reached with ALPA, it is doubtful that it would extend beyond a one or two-year period, as has been customary between these parties. Many of these new hires left, or declined to accept, other employment

positions when they came to work for Continental. It would appear that they have relied upon Continental's representations. If Continental replaces these permanent new hires despite its representation to the contrary, Continental might well be at the mercy of ALPA at the end of any new contract term because of its potential inability to employ replacement pilots should ALPA then undertake a new strike. Continental would have effectively lost credibility with the pilot community in this country, risking the probability that it could not hire replacement pilots in the event of any future strike threat. For Continental to agree as ALPA suggests would place a powerful negotiating weapon in ALPA's hands with respect to future negotiations. In this court's opinion, given all of the circumstances of this case, Continental has valid reason to be concerned over the use of such weapons by ALPA. In all probability, Continental will not have completed any reorganization process within the next two, three nor even five years<sup>5/</sup>. The resulting leverage to ALPA could place in jeopardy any confirmed plan or arrangement.

The strong public right of the worker to engage in a legal strike must be observed. However, the working pilots (including those not on the pre-petition seniority list) and the other working employees have done what they can to preserve the value of the debtor for the benefit of all. Once successful reorganization is achieved or is foreseeable, can the striking employee be heard to claim that Continental is unreasonable in not agreeing that the striking employee may return to work whether a position is available or not and demand his or her former seniority status as a legal right, when it results in the new hire being furloughed?

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<sup>5/</sup> By this is meant the completion of any payout period provided for in a confirmed plan of arrangement. It is not unusual for such pay periods to extend beyond three or even five years.

This court cannot agree that a policy such as ALPA suggests would be in the best interest of the reorganization process.

Although any "legal" and/or "moral" obligation of Continental to the new hires is an important factor, in this court's view there is a much stronger reason for sustaining Continental's position that these needed new hires are now permanent employees and that they should not be replaced by Continental to create positions for returning striking pilots as part of any back-to-work agreement. These reasons are the public policy of keeping the air carrier flying (as provided in the Interstate Commerce Act and in the Railway Labor Act) and in the equally important public consideration and policy of the Bankruptcy Code that a financially troubled company make the highest and best use of its assets and facilities in order to maximize the recovery to creditors and to preserve the business operation for the economy of the country. It is not the least of such policy that it promotes the preservation of this particular job market.

The striking pilots made a choice, although it was no doubt a hard choice. When one makes a choice, it is not always possible to continue to retain both options, and in fact usually this is not the case. When great principles conflict, a court must attempt to determine what the best overall public policy must be under the circumstances. These striking pilots made their decision knowing the potential consequences. They were aware that Continental was asking them to return, that Continental needed pilots to expand its operations, a necessary step if it was to have a successful reorganization, and that Continental was going to hire replacement pilots on a permanent basis if they did not return, and that Continental would not voluntarily allow displacement of these persons who accepted employment under extremely troubling circumstances.

A reorganizing debtor must be efficient in its employment practices, since its ability to survive is at stake. It would not be consistent with the overall purposes of the Railway Labor Act and/or the Bankruptcy Code to thusly penalize the new hire after he has been successful in assisting the debtor to return to profitability.

Certainly Continental needed to give assurance to these new hires that they would not be replaced when the strike was over. No one knew how long the strike might last. This emphasizes (and is consistent with) the strong public policy of the Railway Labor Act to keep the carrier in operation. When you couple this public policy with the circumstances that the carrier in this instance was in a weak financial condition, one must conclude that while the union is free to use self-help under labor law, the debtor likewise had the right to use self-help as Continental did here. There is legal precedent for the position taken by Continental. *Empresa Equatoriana De Aviacion v. District Lodge*, 690 F.2d 838, (8th Cir. 1982); *National Airlines, Inc. v. International Association of Machinists and Aerospace Workers, et al.*, 416 F.2d 998 (CA 5, 1969) cert. denied, 400 U.S. 992 (1971); *Flight Engineers International Association v. Eastern Airlines, Inc.*, 359 F.2d 303 (2nd Cir. 1966); *International Association of Machinists v. Central Airlines, Inc.*, 355 S.W.2d 803 (Civ. App. Texas, 1962) cert. denied, 371 U.S. 934 (1962), reh'g denied, 371 U.S. 970 (1963).

In the case of *Flight Engineers International Assoc. v. Eastern Airlines, Inc.*, supra, ALPA itself successfully espoused the position that its members should permanently replace striking flight engineers.

In *National Airlines, Inc.*, supra, page 1006, the court stated: "Under both the N.L.R.A. and the Railway Labor Act, a carrier need not discharge those hired to replace strikers.

The hiring of replacements for the strikers would have been consistent with the attempt to restore service." In *Empresa Equatoriana*, supra, the court stated on page 846 that "the carrier could replace strikers where necessary to its operation." On page 847 it said: "The strikers who were properly replaced are entitled to be placed on such [a preferential hiring] list, to be rehired when their replacements quit or when a similar vacancy arises. Without the hiring preference, the concept of replacement becomes indistinguishable from discharge."

The hiring of permanent replacement employees in a strike situation has been held to be an acceptable practice under the National Labor Relations Act. In *NLRB v. Mackay Radio and Television Co.*, 304 U.S. 333 (1938), the Supreme Court held that permanent replacements hired in an economic strike need not be terminated to make room for returning strikers. On page 345, the court said it is not "... an unfair labor practice to replace the striking employees with others in an effort to carry on the business" and that an employer is "not bound to discharge those hired to fill the places of strikers upon the election of the latter to resume their employment in order to create places for them." See also *Gulf States Manufacturers, Inc. v. NLRB*, supra, page 1327 and 1328.

To require the debtor to place in effect at this time rules which would cause the termination or furlough of these people who have made a vital contribution to the effort to reorganize, would in this court's opinion, serve as a bad precedent for future reorganization cases.

While Continental is free to make the choice of agreeing or not agreeing with ALPA on this point, this court declines to accept ALPA's view that Continental has engaged in

unreasonable bargaining (or bad faith) in refusing to accept ALPA's position on this point.

**THE STATUS QUO PROVISIONS OF THE  
RAILWAY LABOR ACT, THE EMERGENCY WORK RULES,  
AND REJECTION OF THE CONTRACTS AND THEIR TERMS**

As noted above, immediately upon filing of its Chapter 11 proceeding on September 24, 1983 Continental unilaterally implemented new wage rates and work rules for each of its union groups, including the pilots. Continental undertook this action notwithstanding that the agreements with the pilots were not then open for negotiation and, further, the negotiating procedures of Section 6 of the Railway Labor Act had not been exhausted, as specified by the Act ("RLA").

The unions argue that notwithstanding § 365 of the Bankruptcy Code, the status quo provisions of the Railway Labor Act prohibit any unilateral change in the wage rates or work rules "on the property" until all negotiations pursuant to the scheme of the status have been exhausted. The Unions, including ALPA, argue that there is a difference between making unilateral changes in a contract which might be rejected the provisions of § 365 of the Bankruptcy Code and the statutory provisions of the RLA, which (they allege) continue the terms of the contracts in effect until the bargaining procedures have been completed. The Unions argue that § 365 does not authorize rejection of statutory requirements, as opposed to contractual provisions, i.e., this court cannot authorize changes in the wage rates and work rules of a carrier governed by the RLA until the Section 6 bargaining procedures have been exhausted. ALPA no doubt would concede that such procedure may take years (indeed it has already taken about nine months since filing without effect).

Unquestionably the Railway Labor Act contains "status quo" provisions. As noted by the 5th Circuit in the *United Industrial Workers of the Seafarers International Union of North America v. Board of Trustees of Galveston Wharfs*, 400 F.2d 320, page 329 "the objective of the Railway Labor Act is continuance of the status quo until the statutory procedures of the Act have been exhausted." And "As the Supreme Court stated in *Order of Railway Telegraphers v. Railway Express Agency*, 1943, 321 U.S. 342, 347, 64 S. Ct. 582, 586, 88 L. Ed. 788, 792, the failure of the carrier to proceed as provided by the Railway Labor Act of 1926, then applicable, leaves the collective agreement in force throughout." The court also noted with approval the language of *Order of Railway Conductors v. Pitney*, 1946 326 U.S. 561, to the effect that the object of Section 6 is to maintain the status quo pending the expiration of the period provided by the section for allowing the process of negotiation, mediation and conciliation to have a play. It is to prevent changes being made until these processes have been exhausted or the prescribed waiting period has expired without bringing them into effect. The 5th Circuit also noted that the Railway Labor Act is more concerned than the National Labor Relations Act ("NLRA") with continuance of the employers operations and the employer-employee relationship. This is evidenced by the fact that while bargaining is the first and last step under the NLRA it is only the first step under the Railway Labor Act in a ladder that leads to the White House if differences cannot be resolved.

Generally speaking, this principle is recognized by virtually all labor law precedents. On the other hand, while the Supreme Court in *Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, ALF-CIO, et al v. Florida East Coast Railway Company*, 384 U.S. 238 (1965), recognized the requirement by law for the railway to abide by all the rates of pay, rules, and working conditions

specified in the existing collective bargaining agreements until the termination of the statutory mediation procedure, the court allowed exceptions "upon specific authorization of [the U.S. District] court after finding a reasonable necessity therefore". The Supreme Court therein recognized that one of the primary purposes of the Railway Labor Act is to keep the carrier operating. On page 246 the court notes "that the procedures of the Act are purposely long and drawn out, based on the hope that reason and practical considerations will provide in time an agreement that resolves the dispute". In that nonbankruptcy case, the Supreme Court held that under emergency conditions the carrier would implement new terms and conditions governing the labor force as long as those changes were necessary for the railroad to fulfill its duty to continue operations, provided the power to make such changes is closely confined and is supervised. Thus, the Supreme Court has recognized that the status quo provisions of the Railway Labor Act must, in some instances, bend to the exigencies of the situation.

The evidence in the instant case shows that, had Continental not been able to significantly reduce its labor costs (by the unilateral implementation of less costly and more efficient work rules and pay rates) at the time it filed this proceeding, Continental would have run out of cash and would no longer be operating at the present time. It would have had to shut its doors even before this hearing commenced. Continental was simply in no position to continue its operations under the wage rates and working conditions contained in its agreements with the Airline Pilots Association. It did not have the money to do so nor the ability to acquire it. In addition, under the circumstances, Continental could not even have reduced its operations (as it did beginning September 27, 1983) and still have complied with the terms of its agreement with the ALPA. Continental reduced them

significantly, and it needed the low cost, the efficiency, and the flexibility of its emergency work rules in order to do so.

ALPA's contention cannot be sustained under the law. By virtue of § 1167 of the Bankruptcy Code (11 U.S.C. § 1167), the U.S. Congress provided that notwithstanding § 365 a debtor-in-possession under Chapter 11 of the Code cannot change the wages or working conditions of employees of a debtor subject to the Railway Labor Act except in accordance with Section 6 of such act. Changes in wages and working conditions would and are otherwise authorized by § 365 of the Bankruptcy Code. The Congress then expressly provided in § 103(g) of the Bankruptcy Code that Subchapter IV of Chapter 11 applies only to a case under such chapter concerning a railroad. *Section 1167 is part of Subchapter IV of Chapter 11.* Continental is not a railroad. Under the statutory scheme thusly set forth Congress, in its wisdom, by clear implication provided that a debtor governed by the Railway Labor Act need not comply with Section 6 of that act before making unilateral changes in wages and work rules if it is in Chapter 11 and is not a railroad. The statutory scheme of the Bankruptcy Code thereby provides for the action taken by Continental in this instance. It might well be noted that the Bankruptcy Code was enacted in 1978, the same year that airline deregulation became effective.

Further, since the contracts are no longer immediately enforceable after filing, the changes in wages and work rules are accomplished not by the employer's unilateral action, but rather by operation of law. *NLRB v. Bildisco & Bildisco*, supra, 104 S. Ct. 1188 at page 1200. In *Bildisco*, the Supreme Court laid down a pragmatic rule in dealing with the National Labor Relations Act. This court is persuaded that the reasoning of the Court in that case is likewise applicable here in relation to the RLA. As noted above, this debtor would not have survived implementation of the suggestion by the

Airline Pilots Association that Continental could make no post-filing change in its wage rates and working conditions.

In *Bildisco*, the Court held that the authority of a debtor-in-possession to seek rejection of the collective bargaining agreement was not qualified by the restrictions of Section 8(d) of the NLRA, which section established detailed guidelines for midterm modification of collective bargaining agreements. The Court noted the policies of flexibility and equity built into Chapter 11 of the Bankruptcy Code. These policies were desperately needed by Continental at filing in order to continue its duties as a carrier. As noted, performance of this duty to continue public service is one of the primary purposes of the RLA. At least to that extent, the Bankruptcy Code and the RLA are entirely consistent and compatible.

The Supreme Court did not fully accept the "new entity" theory utilized by the Court of Appeals in its *Bildisco* opinion, 682 F.2d 72 (3rd Cir. 1982), but the Court did observe that the debtor-in-possession, while the same "entity" which existed before the filing of the bankruptcy petition, is nevertheless empowered by the Bankruptcy Code to deal with its contracts and property in a manner that it could not have done absent the bankruptcy filing. The court noted that the fundamental purpose of reorganization is to prevent a debtor from going into liquidation with an attendant loss of jobs and possible misuse of economic resources. The court noted further that recapitalization of a debtor could be jeopardized if the debtor-in-possession was saddled automatically with the debtor's prior collective bargaining agreement. The Bankruptcy Code specifies that the rejection of an executory contract which has not been assumed constitutes a breach of the contract which relates back to the date immediately proceeding the filing of a petition in bankruptcy. 11 U.S.C. § 365(g)(1). The court further noted that if the debtor-in-possession elects to

continue to receive benefits from the other party to an executory contract pending a decision to reject or assume, the debtor-in-possession is obligated to pay for the "reasonable value" of those services, which, depending upon the circumstances of the contract may be what is specified in it. Should the debtor-in-possession elect to assume the executory contract, however, it assumes the contract cum onere.

The Supreme Court concluded that the filing of the petition in bankruptcy means that the collective bargaining agreement is no longer immediately enforceable and may never be enforceable again. Specifically the Court concluded that after the filing, the collective bargaining agreement is not an enforceable contract within the meaning of NLRA Section 8(d), and that it follows that the debtor-in-possession need not comply with the provisions of Section 8(d) prior to seeking the bankruptcy court's permission to reject the agreement. The court further stated that in a Chapter 11 case the "modification" in the agreement has been accomplished not by the employers unilateral action, but rather by operation of law. The court further noted that even the National Labor Relations Board had conceded in that case that the cumbersome and rigid procedures of Section 8(d) need not be imported into the bankruptcy proceedings. The Supreme Court also held that the debtor-in-possession need not bargain to impasse before seeking rejection and that these provisions of the National Labor Relations Act must be subordinated to the exigencies of bankruptcy.

In this court's opinion, the rationale of the Supreme Court in *Bildisco* is equally applicable to the Railway Labor Act and the status quo provisions of that act must give way to the realities of bankruptcy. A company whose financial life is threatened should not, under rational public policy be forced to adhere to principles which, though of good service in times

of ordinary financial health, would, as in this case, jeopardize the company's existence.

The unions' attempt to distinguish *Bildisco* because it dealt with the National Labor Relations Act, whereas Continental is subject to the Railway Labor Act. However, this court is not persuaded that in the situation that Continental now finds itself, there is any persuasive difference from the parameters outlined by the Supreme Court.

If ALPA's argument is followed, the statutory "status quo" provisions of the Railway Labor Act would put a financially troubled debtor to the task of an arduous (and perhaps impossible) process before it could obtain the economic relief which might well be necessary to its continued operation. The result in many instances, including this one, might well be that liquidation would result unnecessarily while lip service was being given to the alleged purposes of the Railway Labor Act, and many jobs would be unnecessarily lost. Clearly the overriding public policy is that more jobs should be saved under these unfortunate circumstances rather than that higher wages be paid for a short period of time before the debtor's financial heart stops beating. The demise of a company is too much of a price to pay for strict adherence to Section 6 bargaining requirements. Any policy which would tend to precipitate this demise could not truly be consistent with the spirit and purposes of the RLA, much less the Bankruptcy Code.

Once a company is legitimately in Chapter 11, as Continental has been found to be, the provisions of Title 11 and the principles of *Bildisco* are applicable to its collective bargaining agreements even though they are otherwise governed by the RLA. Unilateral changes may be made by the carrier at filing, at least where rejection of the agreement is later approved by the court. However, the debtor is still

required to make reasonable payment for the services it receives during the pendency of the proceeding and is obligated to bargain with the certified representatives of the employees both before and after rejection.

Continental was the first airline ever to attempt to fly through a Chapter 11 proceeding. Had Continental requested interim relief from the contract wage levels and work rules and had it been possible to have had such a hearing immediately, such relief would have been granted by this court; given the unusual circumstances concerning its cash position, the changes it made in its level of flying, its competitive situation, and the uncertainties that existed immediately after the filing of this petition.

The fact that other urgent matters were pending on this court's docket prevented it from hearing the evidence on the motion to reject for a few months. When the evidence did begin on January 30, 1984, it extended until April 28, 1984.

It appears to this court that to have required negotiations between the time of filing and the institution of emergency work rules unilaterally imposed by Continental Airlines on its pilots (when operations resumed three days after filing) would not only have required a useless and nonfruitful act (no agreement has been reached nine months later) but would have prevented Continental from resuming domestic operations at that time. Further since rejection is being allowed, had Continental not reduced its wage payments, it would have expended more monies in reliance on the contractual provisions than those necessary to obtain these same services. Continental would have paid more than the reasonable value of these services based on market rates, given all of the circumstances in this case.

Further delays in restricting Continental's flying operations would also have resulted in loss of those advantages it had as a going business. At worst, this could have resulted in the destruction of its business and at best it would have severely diminished its ability to reorganize. In either of these events, it would have stopped payment of wages to all employees for either a longer period or for all time.

### RELATIVE EQUITIES

As has been noted, deregulation has caused some difficulty to the industry majors, including Continental. Other carriers have furloughed employees and many unions have granted concessions to various carriers in light of the increasing competition. Continental has suffered substantial losses since deregulation and now has a substantial debt structure and debt service. This debt service makes it difficult to compare Continental to other airlines in terms of what costs are necessary for it to be profitable.

An effort has been made to show that Continental was solvent when it filed its proceeding and that rejection should not be permitted. The effort to prove solvency stemmed from the appraisal of Continental's air fleet at an amount greater than that shown on its books. In other words, its airplanes have a greater market value than book value. It is axiomatic that for Continental to realize market value from these airplanes they would have to be sold. If they were sold Continental could not operate then. Without airplanes to operate, Continental would have additional obligations from rejections of its numerous leases on ground space and from other executory contracts. Whether the net result, taking all resulting liabilities into account, would show that Continental is solvent is speculative at this time. No effort was made to show this result. Resulting obligations from rejection of

executory contracts are not now on the books of Continental as a liability.

At filing, as determined in connection with the motion to dismiss, Continental had reached the point where it no longer had free assets upon which to obtain any credit and certainly could not obtain credit on the basis of its potential profit margin. Further, assuming Continental was in fact solvent, had Continental adhered to the labor costs specified in the respective collective bargaining agreements, Continental would have soon become insolvent unless it ran out of cash and had to close its doors before this occurred.

Moreover, if assets were liquidated (even at the best market price) there would be no further need for employees at Continental, including those who would seek to be employed under the collective bargaining agreement. Thus a sale of Continental's air fleet would defeat the purposes of such agreements entirely.

Therefore, it seems that for these purposes, a liquidation test for solvency seems foolhardy and a self-defeating way of evaluating Continental, under the circumstances. As a going concern, Continental was losing substantial sums of money. An evaluation of the assets on this basis (capitalized earnings) would not show Continental to be solvent. In addition, at the filing Continental was not paying its debts as they matured.

Unless a company can become profitable and maintain that posture consistently, it is inevitable that it go out of business. If a reorganization proceeding is to succeed, prior accrued indebtedness must be paid out of future profits (unless the company is liquidated). If there is no excess of money over and above operating expenses, there is nothing to pay prior indebtedness with; whether it be secured or

unsecured indebtedness, including any damages resulting from rejection of collective bargaining agreements.

The unions have recognized that Continental needs relief from the high labor cost which results from adherence to the respective collective bargaining agreements. Each has indicated in testimony before this court that it would (and/or did) agree to significant concessions in modification of these agreements. (Even the IAM's representative testified that it would - or might back off of its requested "industry standard" wages.)

The non-union employees agreed to their share of relief (by 80% vote). ALPA points out that Continental realized the savings it requested (pre-filing) from the IAM group as a result of the IAM strike and the interim work rules imposed on August 13, 1983 and by contracting out of much of the IAM employee work. The pilots intimate in testimony that they would have agreed to the \$60,000,000 requested of them and that Continental should have interpreted their "signals" to mean that they would agree to concessions at that level. The UFA has said it would agree to the \$40,000,000 in concessions requested by Continental pre-filing (and even more) but that the problem in reaching agreement has been the dispute over the value (UFA's costing) of the concessions offered by UFA. Continental says they are worth far less than the \$40,000,000 requested, while UFA says they were worth much more (i.e., \$50,000,000). However, the UFA never sent its costing experts to confer with Continental's - so the issue was never resolved. TWU did agree to the concessions requested by Continental pre-filing.

This evidence is indicative of the recognition by these unions that Continental cannot survive under the costs of these agreements as written.

When Continental resumed flying operations September 27, 1983 (after filing its Chapter 11 and being shut down for three days), it severely reduced its fare level on all flights in order to entice the flying public back onto the airline. It also needed to restore the confidence of travel agents who had been "booking away" from Continental as rumors of its financial troubles had grown (pre-filing). This had the desired effect. When it became apparent that the public perceived that Continental could fly through a Chapter 11, Continental increased its fare level but only to the point they were competitive with the low cost airlines flying in competition against them. However, unlike the low-cost competition, Continental still served hot meals on certain flights, and maintained free baggage handling and interchange with other airlines, a reservation service, and other amenities that are normally associated with a full-service airline. This has been criticized severely by the unions, but it has apparently been successful for Continental. Continental had tried maintaining higher fare levels and full service as a means of competing with the new entrants and had found it to be very unsuccessful.

Continental has implemented this marketing program and has set its fare levels in order to maximize its yield. It is not projecting a profit and has been meeting its projections for the first time in a long time. Taking into consideration all of the existing circumstances, this court concludes that Continental's business plan is reasonable.

The unions point out that the emergency work rules unilaterally imposed by Continental at filing would result in annualized cost savings to Continental far in excess of the \$150,000,000 requested just before filing. The unions contend that the annualized savings would be in the area of \$250,000,000. It should be noted that the \$150,000,000 in concessions was calculated merely for Continental to break

even. Further, at the time of the filing of its Chapter 11 proceeding, many uncertainties existed and many changes were taking place within the airline. Continental was cutting back its operations severely for a period of time. It did not intend to return fully to its pre-filing level of flying. It was and is facing increasing competition. There is potential for a fare war and skirmishes are even now being fought.

Continental needed the lower costs and flexibility provided by emergency work rules (or at least substantially so) in order to survive, right itself financially, and progress toward a stable and profit-making posture on a consistent basis. Substantial sacrifices have been, and are going to be, necessary for this airline to revitalize itself. The current working employees are making that sacrifice. They have recognized that meat and potatoes come first; dessert on the terrace comes later.

Because of the collective bargaining agreements the pilots have enjoyed standards of living that make the required sacrifices hard to adjust to. The court can understand why a pilot making at, near, or over \$100,000 per year has set a standard (or cost) of life style that makes adjusting to a salary of \$43,000 or less extremely difficult. Small wonder the pilots resist such a change. But economics can be harsh. It has been to the airline industry in general and to Continental in particular. The pilots have managed to negotiate (over the years) pay benefits and work rules which are onerous and non-productive, especially when compared to those of some of the other competitive carriers. The result was a significant cost imbalance and a substantial advantage to much of Continental's competition. In one sense, the pilots had simply priced themselves (and/or Continental) out of the existing market.

The average 1982 earnings for Continental captains (excluding TXI pilots) were \$89,673 the 94 DC-10 captains salary averaged \$101,793 in 1982. An analysis by the Economic Analysis and Information Services Department of ALPA concluded on July 28, 1983 that between 1980 and 1982 "pilots average earnings are greater than" the average earnings of accountants, attorneys, college professors, dentists and Ph.D. chemists and that only doctors earn more than pilots but that pilots salaries were increasing at a faster rate than those of any other profession.

Furthermore, the evidence showed that the actual hard-hour utilization of pilots was less than 60 per month, pre-petition. Scheduled flying days for pilots in May, 1983 (presented as an example) averaged 14 days for regular DC-10 and 727 pilots on domestic flights. In addition, pilots got substantial vacation time (between 16 and 44 days per year depending on seniority). This vacation time can, at least in part, be used to further reduce scheduled flying time.

Federal Aviation Regulations permit utilization of pilots up to 100 "block hours" in a calendar month, not to exceed 1,000 block hours per year.

It should be noted that traditionally Continental's labor force has historically been over 50% non-union, 6,776 out of 12,008 employees pre-petition and 3,553 out of 5,763 employees post-petition (56.4%) as of January 31, 1984.

As observed above, more than 50% of the currently active employees in each unionized job category<sup>6/</sup> (and more

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6/ At the time the IAM struck, 12:01 a.m. EDT, August 13, 1983, Continental sold all three of its flight kitchens (at Los Angeles, Denver and Houston) and contracted out this service and that of cabin cleaning and

(continued...)

than 80% of the active flight attendants) have elected to cross their own union's picket lines. This appears to be indicative of these employees' acceptance of the need of Continental for relief from the respective collective bargaining agreements and their willingness to work at the wage levels and under the working conditions (including increased productivity) being currently offered by Continental.

Continental is offering a living wage to its currently flying pilots. In addition, it is offering to its employees a profit-sharing plan guaranteeing each a participation in 25% of the profits of the airline from the first dollar upward. It has also proposed to this court for approval a stock ownership plan which would make the employees 35% owners of the company on a fully diluted basis. They as a group, would then be the largest shareholder of the company. Overall, morale appears to have increased post-filing to a very high level. As of April, 1984, Continental had grown to approximately 6,000 employees and was projecting 8,000 employees by the year end.

As of April 1, 1984, Continental had 1,070 active pilots, including those currently in training or on leave. Of this number, 494 were new hires and 576 were from its pre-petition seniority list. It employed 1,471 flight attendants, of which 270 were new hires and 1,201 were from its pre-petition seniority list. All of the ground instructors were still on the payroll as were 21 out of the 35 dispatchers (14 dispatchers were still on furlough).

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6/ (...continued)  
fueling because it could contract this service from third parties substantially cheaper than it could perform them with IAM employees under the terms of the IAM collective bargaining agreement.

Beginning in October, 1981, Continental management personnel endured a 10% pay cut and non-union employees had to forego scheduled pay increases. In January - February, 1982 personnel department positions were reduced by 35% and general staff levels in other offices were reduced 15%. In 1983, 25% of the remaining management staff jobs and 15% of the line management positions were eliminated. Non-unionized personnel and management were required to work extraordinarily long work hours and even split shifts in some instances. Just prior to the filing of bankruptcy, management employees had a 15% pay cut and reduction in benefits, and, as noted, non-unionized employees voted to accept similar reductions.

It is true that there were "snap back" provisions relating to these management pay cuts, and their salaries have been increased (snapped back) in part already. However, under the evidence, this court is convinced that Continental management employees are being paid materially less than competitive salaries for top management positions that other companies are paying for similar management skills. In addition, as noted, Continental management personnel have been required to work extraordinarily arduous schedules. Further reduction in their wages could result in loss of key employees, and it appears that Continental has in fact already suffered from this problem.

This court finds that non-union and management personnel have made sufficient sacrifices to justify rejection of the respective union contracts when balancing the rights between them. This is particularly true when you consider the high level of wages and salaries which had been bargained for by the various unions and agreed to by Continental, as set forth in these contracts.

Labor costs, were a major factor contributing to Continental's bankruptcy. If the contracts had not been rejected, the administration claims resulting from reinstating the contracts (and their resulting high cost) from the date of filing would in and of itself be highly damaging to the prospects of reorganization. Further, if the company is liquidated under Chapter 7, the contracts would be rejected as a matter of law, 11 U.S.C. § 365(d), and this rejection would likewise relate back to the date of filing.

Low labor cost are necessary for Continental at the present time and at least for the near term, foreseeable future, in order for Continental to be competitive.

Virtually no effort was made by ALPA to show that Continental could afford to pay materially more to its pilots than it is now doing under the emergency work rules. The only effort was a calculation to show that if Continental raised its fare levels without losing any of its passenger miles, it could do so. However, no evidence was introduced that convinces this court that if Continental materially raised its fares it would not lose a substantial portion of its flying customers.

There is little loyalty, if any, among passengers. Passenger miles are essentially fungible. Ticket prices remain the single most important element in attracting the flying public.

The court rejects the motion that Continental could materially raise its ticket prices and materially increase its pilots labor costs, unless, and until, its competition also raises ticket prices. That adventure has already been embarked upon by Continental in the past; all to its financial dismay.

It appears to this court that substantial jobs will be preserved as a result of rejection of these contracts. Certainly the creditors are likely to get more under any plan of arrangement than in liquidation; in fact, it is usually necessary for the court to find that they will receive not less than they would under Chapter 7 liquidation before any plan of arrangement can be confirmed. 11 U.S.C. § 1129(a)(7). Any such plan must be based on future earnings. From the evidence, it appears that there will be no earnings unless these contracts are rejected. Labor costs are such an important element in Continental's ability to operate profitably and to remain competitive that it cannot offer a plan or arrangement until it knows if the contracts are to be rejected, and, thereby, what its future labor costs are likely to be. The respective contracts must be rejected to get any new capital. No viable business plan can include a return to all of Continental's pre-petition labor costs.

Rejection will no doubt result in reduction in standards of living of many of the employees, and possibly even hardship in certain cases. Nevertheless, under the circumstances and the economics currently prevailing, there appears to be no reasonable alternative.

The unions argue that this court cannot make necessary determinations in order to allow rejection of the contract in light of the fact that Continental has not offered a plan of arrangement, because this court cannot assess the viability of such a plan or the need to reject the contracts as an integral part thereof. This court disagrees. The Supreme Court in *Bildisco* understood the difficulties in assessing the outcome of a potential reorganization in the beginning stages of such a proceeding. At this time the court cannot say that Continental will have a confirmed plan of reorganization, nor even that the confirmed plan will be successful, but it has determined that without rejection no viable plan providing for

future operation by Continental of its own air fleet is possible. The Supreme Court noted that "the Bankruptcy Court inquiry is of necessity speculative, and it must have great latitude to consider any type of evidence relevant to this issue." I believe that the findings of this court have satisfied this issue as required by *Bildisco* and other cases. In this instance, the inability of the parties to reach an agreement is in itself a deterrent to any plan of arrangement.

There was testimony that Continental could not afford any substantial increase in its current labor costs. A return to pre-petition labor costs under the ALPA contracts would preclude Continental from effective competition with the low cost, new entrants; some of which have negotiated contracts with the very unions which oppose Continental's motion to reject.

The unions argue that if the court allows rejection of the agreements, it should only allow rejection of those parts of the agreements that are burdensome and (presumably) should require affirmation of all other parts. This court has no true way to know the financial impact of each particular provision in the agreements. The Supreme Court in *Bildisco* noted that the bankruptcy court "need not determine that the parties have bargained to impose or make any other determination outside the field of its expertise." (Emphasis added).

The ALPA and UFA contracts are extremely complex. This court could not possibly rewrite them for the parties. If it tried to do so, in all likelihood serious mistakes would be made. As noted in the *Bildisco* opinion, the National Labor Policies generally require that employers and unions reach their own agreements on terms and conditions of employment free from governmental interference. The court cited *Howard Johnson Company v. Hotel Employees*, 417 U.S. 249 (1974); *NLRB v. Burns Security Services*, 406 U.S. 272, 282-294 (1974).

See also *Chicago and Northwestern Railway Company v. United Transportation Union*, 402 U.S. 570, page 579, footnote 11, referring to the strong federal labor policy against governmental interference with the substantive terms of collective bargaining agreements.

There is no provision in the Bankruptcy Code which would provide for rejection in part. Historical case authority indicates that executory contracts must be accepted cum onere or not at all. The Supreme Court in *Bildisco* did not provide for any such authority by this court; especially since the court noted that acceptance must be cum onere and cited *In re Italian Cook Oil Corp.*, 190 F.2d 994, 996 (CA 3 1951) for that proposition.

Continental has a continuing duty to bargain with the certified representatives of its employees in good faith. These parties are themselves in a better position to know the effect of the various provisions of their future agreements, which, by their nature, are extremely complex. Should this court impose restrictions or conditions on the rejection of these agreements, the court would not only be involved in an area outside of its expertise but it would violate strong principles of labor law that government not interfere in this bargaining process. This court should not impose on either party its own notions of what is fair or reasonable or economical under the circumstances. Neither the Bankruptcy Code provision (§ 365) nor applicable case law mandates that this court set any terms or conditions on the rejection and this court declines to do so in this instance.

The unions next argue that if the court is going to allow rejection of the agreements it should impose conditions on the rejection, such as requiring Continental to (1) reoffer its pre-petition concession package, (2) reimpose the "non-economic" provision of the agreements, and/or (3) implement those

provisions which have been "signed-off" on in the various labor negotiations. The unions cite *In re Parrot Packing Co., Inc.*, 99 C.C.H. Labor case P10, 550 (U.S.D.C. No. Dist. Indiana, Ft. Wayne Division, case number 83-10127) August 2, 1983, as precedent for this proposition.

The concessions that were requested pre-petition do not necessarily relate to the current labor cost requirements of Continental. The question of which provisions are in fact non-economic is in issue. Those "signed-off" provisions were not intended by the parties to be binding unless and until a complete and integrated collective bargaining agreement was reached; they were simply tentative and conditional. On the other hand, it is certainly fair for the unions to bring up these tentative agreements as well as the non-economic provisions in the future bargaining sessions that must take place.

If this court has the authority to impose such conditions it declines to do so in this instance.

The unions, including ALPA, have not seriously challenged with evidence that Continental is in serious financial condition or that it was losing money, nor that it needed serious economic concessions if it were to continue. Nevertheless, ALPA urges that the emergency work rules have inflamed the pilots.

The insult to the unions stems from the affrontery of the employer escaping from the "bonds" of their labor agreements before their very eyes; and in a highly visible way. However, this employer, while it appears to be the same, now has different characteristics and powers. Section 1107 of Title 11 proscribes that a debtor-in-possession has all of the rights, duties, and responsibilities of a trustee. Were there to be an "actual" trustee (i.e., a disinterested third person who could be perceived as acting on behalf of all interested parties) this pill

(having this modicum of sweetener) might not be so difficult to consume without even the benefit of liquid refreshment. Small wonder that frustration so conceived is the bearer of ill will and dismay.

Nevertheless, economics have changed substantially in the airline industry. Recognition must be given to this. The ALPA contracts give no such recognition nor any flexibility to deal with the existing circumstances. Under these circumstances, rejection of these burdensome agreements should be, and are, permitted under law.

To comply with the RLA, ALPA (as well as Continental) must continue to bargain. ALPA must lay aside other considerations and recognize that this is an economic problem. Economic problems are rarely, if ever, resolved in the courtroom. The striking ALPA pilots need the bargaining expertise of its union now more than ever. If properly and steadfastly exercised, the bargaining ability of ALPA can determine what level of pay and benefits Continental can afford to pay under existing economic circumstances. Whether, ALPA has alienated the working ALPA pilots to the extent that it has lost the leverage of support from this group remains to be seen. However, ALPA and Continental must bargain from the relative positions in which they now find themselves.

Signed this 17th day of August, 1984.

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R.F. Wheless, Jr.  
U.S. Bankruptcy Judge

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 89-2455

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TEXAS AIR CORPORATION,  
Plaintiff-Appellee,  
and

CONTINENTAL AIR LINES, INC.,  
Party In Interest-Appellee,

versus

AIR LINE PILOTS ASSOCIATION,  
Defendant,  
versus

JOSEPH E. O'NEILL, PHILLIP M.  
ORDWAY, JAMES LOWRY, and  
JACK PENDLETON, Etc.,

Intervenors-Appellants.

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Appeal from the United States District Court for the  
Southern District of Texas  
(CA H 84 530)  
( April 13, 1990 )

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Before BROWN, JOLLY, and DAVIS, Circuit Judges.

E. GRADY JOLLY, Circuit Judge:\*

On August 18, 1982, Texas Air Corporation ("TAC"), the parent of Continental Air Lines ("Continental"), and the Air Line Pilots Association ("ALPA") executed a Letter of Agreement ("the Side Letter") in which TAC agreed "to provide reassurance that it is aware of and will abide by" the contemporaneously executed "Prosperity Plan" collective bargaining agreements between Continental and ALPA. Continental filed a Chapter 11 bankruptcy petition on September 24, 1983. On October 1, 1983, ALPA commenced a strike against Continental.

On January 31, 1984, TAC commenced this action seeking a declaratory judgment that the arbitration provision in the Side Letter could not be enforced because of Continental's bankruptcy. On January 23, 1985, the district court ruled that the dispute was covered by the Side Letter's arbitration clause, and it granted ALPA's motion to compel arbitration. TAC filed a timely motion to alter or amend the district court's order.

Following intensive settlement negotiations, on October 30, 1985, Continental and ALPA agreed to resolve ALPA's strike and to settle related litigation and bankruptcy claims. After resolving most of the issues through negotiations,

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\* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that rule, the Court has determined that this opinion should not be published.

Continental and ALPA agreed to submit the remaining issues to Bankruptcy Judge Roberts, whom the parties designated by agreement to act as an interest arbitrator, in order to finalize the settlement. On October 31, 1985, Judge Roberts entered an Order and Award setting forth the terms of the settlement. The Order and Award ended ALPA's strike against Continental and contained back-to-work provisions. The Order and Award also required Continental and ALPA to dismiss strike-related litigation. An attachment to the Order and Award included the instant case as number five in a list of eighteen pending litigation matters to be "dismissed with prejudice," with the additional notation, "ALPA to withdraw with prejudice its request for arbitration and waive all claims arising under the TAC-ALPA Side Letter." The instant suit, however, remained pending despite the language of the Order and Award.

On February 18, 1986, while the TAC motion to alter or amend the district court's order compelling arbitration was still pending, the pilot-appellants in this case ("the O'Neill Group") moved as a class to intervene as of right in ALPA's claim against TAC pursuant to Fed.R.Civ.P. 24(a). The O'Neill Group pilots sought an order requiring TAC to arbitrate with them in ALPA's stead.

On July 28, 1987, the district court granted the pilots' motions to intervene and denied TAC's motion to alter or amend the order compelling arbitration.

On August 3, 1987, TAC filed a motion to vacate the order compelling arbitration. The O'Neill Group filed a cross-motion to enforce the order compelling arbitration. Although no motion to vacate the intervention order was pending before it, the district court vacated its previous order granting the pilots intervention of right, vacated the order compelling arbitration, and denied the O'Neill Group's motion to enforce

the order compelling arbitration. The district court held that the pilots were not entitled to intervene because individual pilots did not have rights to enforce the Side Letter and because the pilots were bound by ALPA's agreement to dismiss this case and "waive all claims arising under the TAC-ALPA Side Letter" in exchange for the benefits of the settlement for the striking pilots as a group. The O'Neill Group filed a timely notice of appeal.

An applicant is entitled to intervene as of right under Fed.R.Civ.P. 24(a) "when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties." Review of a decision to deny a motion to intervene under Fed.R.Civ.P. 24(a) based on the applicant's interest in the subject matter presents a question of law subject to de novo review. *Mothersill D.I.S.C. Corp. v. Petroleos Mexicanos, S.A.*, 831 F.2d 59 (5th Cir. 1987).

We conclude that the district court correctly denied the O'Neill Group's motion to intervene, and we affirm the judgment of the district court for the following reasons:

1. The Side Letter is a contract between TAC and ALPA. The pilots were not parties to the Side Letter and were not granted any right to enforce its terms. Indeed, the Side Letter gives ALPA the exclusive authority to enforce its terms and to settle disputes arising under the Side Letter. "Where only the parties to the labor agreement are given the power to invoke the grievance machinery, an individual may not sue to compel arbitration." *Harris v. Chemical Leaman Tank Lines, Inc.*, 437 F.2d 167, 170-71 n.4 (5th Cir. 1971). The O'Neill Group's reliance on cases that characterize

employees as third party beneficiaries of collective bargaining agreements is misplaced for two reasons: (1) the Side Letter is not a collective bargaining agreement; and (2) alternatively, none of those cases supports the proposition that an employee has standing to sue under a labor contract where the contract vests exclusive authority in the union to seek arbitration or where the union subsequently agrees to waive and settle all disputes under the contract.

2. In the Order and Award, ALPA expressly and unambiguously agreed to waive "all claims" arising under the Side Letter. The pilots argue, however, that the strike settlement preserved their individual claims because the settlement covered only those claims that ALPA had against Continental and TAC. We disagree. As of October 31, 1985, the date of the Order and Award, the O'Neill Group had not asserted or threatened any claims under the Side Letter and had not applied for leave to intervene in the lawsuit between TAC and ALPA with respect to the Side Letter. Nothing in the settlement or in the bankruptcy court and district court orders relating to the settlement preserves any individual claims by members of the O'Neill Group with respect to the Side Letter.

3. The pilots argue that ALPA had no authority to enter into a strike settlement that would extinguish their individual claims. We hold that ALPA had authority to bind the pilots to the settlement because the Side Letter itself gave ALPA exclusive authority to settle disputes arising thereunder and, alternatively, because the Side Letter dispute arose out of a classic "major" dispute. Furthermore, even if there were some doubt as to ALPA's legal authority, the pilots are estopped to deny that authority by their repeated acknowledgment of ALPA's status as their representative and by their failure to communicate the existence of limitations on

that authority or otherwise to repudiate ALPA's authority prior to ALPA's agreement to settle on their behalf.

"Major disputes" under the Railway Labor Act relate primarily to the formation of collective bargaining agreements; "minor disputes" involve the interpretation of collective bargaining agreements and the resolution of lesser disputes related to the employment relationship. *Elgin, Joliet & Eastern Ry. Co. v. Burley*, 325 U.S. 711 (1945) (*Burley I*), *aff'd* on rehearing, 327 U.S. 661 (1946) (*Burley II*). Contracts that do not directly establish rates of pay may nonetheless deal with working conditions and be subject to federal labor laws. See *Retail Clerks Int'l Ass'n v. Lion Dry Goods, Inc.*, 369 U.S. 17, 26 (1962); *Morales v. Southern Pacific Transp. Co.*, 894 F.2d 743 (5th Cir. 1990) ("[s]tate law claims which grow out of the employment relationship can constitute 'minor disputes' under the Act, even when the claims do not arise directly from the collective bargaining agreement itself"). The collective bargaining representative has the exclusive right to bargain for and bind all employees in its jurisdiction where a "major dispute" is concerned. *Burley I*. With respect to a "minor dispute," however, settlement by the union "in the absence of legally sufficient authorization will not bar a suit by the individual employee to enforce his claim." *Broniman v. Great Atlantic & Pacific Tea Co.*, 353 F.2d 559, 562 (6th Cir. 1965), *cert. denied*, 384 U.S. 907 (1966).

The pilots contend that, "by analogy to" the Railway Labor Act, their claims under the Side Letter constitute a "minor dispute" because those claims involve the interpretation and enforcement of an existing agreement, the Side Letter, which by its own terms is not a collective bargaining agreement and has nothing to do with bargaining for the future. The pilots therefore contend that ALPA's settlement is not binding on them because ALPA did not have express or implied authority to settle the pilots' claims against TAC. We

disagree. The O'Neill Group's claims under the Side Letter arose out of Continental's rejection of its collective bargaining agreement with ALPA, which triggered ALPA's subsequent strike. The strike settlement that ended the strike and contained detailed back-to-work provisions clearly resolved a "major" dispute. In negotiating that settlement, ALPA had the authority to settle all claims arising out of that dispute, including claims, such as those under the Side Letter, that might in other circumstances be deemed "minor" disputes. *National Airlines, Inc. v. I.A.M.*, 478 F.2d 1062 (5th Cir. 1973); *United Indus. Workers v. Board of Trustees of Galveston Wharves*, 400 F.2d 320 (5th Cir. 1968), *cert. denied*, 395 U.S. 905 (1969).

TAC's motion to dismiss this appeal on the grounds of res judicata and mootness is denied. We also reject both parties' arguments regarding collateral estoppel, because we conclude that application of the doctrine of collateral estoppel is inappropriate in this case.

For the foregoing reasons, the judgment of the district court is

A F F I R M E D.

1. This Verified Counterclaim is brought for injunctive and declaratory relief and for damages suffered by Continental as the result of an unlawful scheme by ALPA to disrupt the business and operations of Continental by actions taken to undermine Continental's legitimate efforts to ensure

the pilot training and staffing necessary for the proper conduct of Continental's future flight operations.

2. This Verified Counterclaim alleges three causes of action arising under the following laws:

- a. The Railway Labor Act, Title 45, U.S. Code, § 151 et seq.;
- b. The common law of the State of Texas.

#### JURISDICTION AND VENUE

3. This Court has jurisdiction under Title 28, U.S. Code, § 1331, 1337, 2201, 2202; Title 29, U.S. Code § 185; and has pendent jurisdiction of Continental's Texas common law tort claim.

4. Personal jurisdiction and venue are based on Title 28 U.S. Code, § 1391, since ALPA is found within, has agents within, and transacts its affairs in the Southern District of Texas, Houston Division.

#### PARTIES

5. Continental is engaged in the business of providing air transportation service in interstate and foreign commerce pursuant to certificates of public convenience and necessity issued by the Civil Aeronautics Board under the Federal Aviation Act of 1958. Continental is a common carrier by air as defined in § 201 of the Railway Labor Act, 45 U.S.C. § 151 ("the Act"), and is subject to the provisions of the Act.

6. ALPA is an unincorporated association organized for the purposes and objectives of a labor organization, and

for other purposes, doing business in this judicial district. Prior to August 26, 1985, Continental had voluntarily recognized ALPA as the collective bargaining representative, as defined in the Act, for pilots employed by Continental. On August 26, 1985, Continental withdrew recognition of ALPA after receiving a petition signed by a majority of Continental's pilots which stated that the pilots no longer wished to be represented by ALPA.

#### FACTUAL BACKGROUND

A. Throughout Its Strike Against Continental, ALPA Has Resorted To Unlawful Conduct.

7. On September 24, 1983 Continental filed with the United States Bankruptcy Court for the Southern District of Texas petitions for relief under Chapter 11, Title 11 of the United States Code. Continental is continuing to operate its business as Debtor-in-Possession.

8. On October 1, 1983, ALPA went on strike against Continental. The strike has been a long and bitter one. Rather than bargain in good faith with Continental to resolve their disputes, ALPA has chosen instead to resort to economic coercion and, at times, to violent and unlawful conduct against Continental and its nonstriking pilot employees. In its Memorandum of Authorities Authorizing Rejection of ALPA's Collective Bargaining Agreements the Bankruptcy Court found:

[T]his court is concerned that the Airline Pilots Association does not intend to reach an agreement with Continental on terms the airline can afford. ALPA appears to have strong motives for seeing that the carrier is shut down as an example to the other carriers whose

pilots are represented by this large and extremely powerful union.

...

In the courtroom, ALPA has verified that its purpose is to shut down Continental. The Airline Pilots Association has made it clear, and has convinced this court, that its primary aim is to shut down Continental Airlines.

...

Thus ALPA's actions to shut down Continental and/or to deprive it of profitability reflects on ALPA's good faith in bargaining and on any equities involved.

9. Shortly after ALPA called its strike, ALPA induced a number of pilots to support the strike by means of misrepresentations as to the status of Continental's liability insurance. Such pilots had accepted flight duty and reported for their assigned flight, but upon hearing ALPA's misrepresentations "walked off" just before the time scheduled for take-off; at that late time it was extremely difficult, if not impossible, for Continental to find a replacement. This tactic led to lengthy flight delays, or to last minute cancellation of flights, when passengers were ready to board or had already boarded. It caused great inconvenience to the traveling public and damaged Continental's reputation. Continental secured a temporary restraining order against such misrepresentation on October 3, 1983 in the District Court, Harris County, Texas.

10. When ALPA's strike was called on October 1, 1983, approximately 190 Continental pilots immediately crossed the picket line to fly for Continental. Since that time, the number of pilots electing to cross ALPA's picket line has increased dramatically, to approximately 630. As the

Bankruptcy Court has found, Continental has honored pre-strike seniority of all pilots returning from the strike.

11. In October, 1983, ALPA, because of its concern about the number of pilots electing to go back to work, began an organized program involving the commission of criminal and violent acts against Continental's working employees designed to shut down the airline by intimidating pilots into joining ALPA's strike, and by otherwise victimizing and threatening Continental's employees. Scores of working pilots and their families were threatened with bodily harm and/or death if they did not stop flying and support ALPA's strike.

12. ALPA has also attempted to stop the working pilots from flying by subjecting the working pilots to hundred of incidents of vandalism to their homes and property and verbal and physical harassment. This pattern and practice of ALPA harassment has included: slashing and punching holes in automobile tires; splashing paint, paint remover and caustic substances on automobiles, homes, airplane hangars and equipment; painting and burning "scab" and other derogatory epithets onto lawns and property with caustic substances; inserting toxic and noxious odor-causing chemicals into homes and automobiles; cutting off working pilots' utilities without their consent; ordering magazine subscriptions and charging strike-supporting mailgrams to working pilots without their consent; mailing obscene letters and photographs to working pilots; and numerous other similar acts.

13. In further efforts to intimidate working pilots into joining the strike ALPA and certain ALPA members coordinated a series of arsons and bombings directed against working pilots. These criminal and life-threatening acts, and the subsequent knowledge of their occurrence among Continental's working pilot group, were intended to coerce and prevent pilots from crossing picket line and intimidate

working pilots into joining the strike thereby shutting down Continental's flight operations entirely.

14. ALPA's activities have also been focused directly at Continental's business operations. In December 1983, certain ALPA members met and planned the simultaneous contamination of Continental facilities in Denver and Houston with toxic chemicals for the purpose of causing major disruptions to Continental's flight operations during the Christmas holiday period.

15. As a result of illegal strike actions by ALPA members Continental was forced to seek and obtain Temporary Restraining Orders and/or Preliminary Injunctions to enjoin such conduct at airports serving Houston, San Antonio, Dallas-Ft. Worth, San Diego and Los Angeles.

16. At various times since the commencement of ALPA's strike, ALPA through its agent members has made and induced others to make phony reservations on Continental flights in an effort to injure Continental by causing substantial "no-showing" on Continental flights.

B. Continental's Withdrawal of Recognition of ALPA.

17. In August, 1985, Continental received a petition signed by over 1,400 Continental pilots stating that those pilots no longer wished to be represented by ALPA. The number of pilots signing the petition was in excess of a majority of all pilots employed by Continental, including both working and striking pilots, who would be considered eligible voters in any election conducted under the auspices of and in accordance with the rules of the National Mediation Board. To honor the wishes of its pilots, Continental withdrew its voluntary recognition of ALPA as representative of its pilots on August

26, 1985. See Exhibit 1 attached to this Verified Counterclaim.

18. ALPA continues to claim that it is the collective bargaining representative for Continental's pilots. ALPA has not followed the Railway Labor Act's statutory procedures for resolution of its representation dispute with Continental.

19. ALPA has chosen to resort to unlawful economic coercion and self-help to resolve its representation dispute with Continental. ALPA is attempting to disrupt Continental's future flight operations by sabotaging the "System Bid" process utilized by Continental to fill vacant pilot positions and to ensure the training and staffing necessary for the proper conduct of Continental's future flight operations.

C. The System Bid Process

20. Continental's pilot employees have historically determined their assignment to vacant positions through a process known as the "System Bid" process. Continental's pilot positions are classified by rank or "status," (i.e. Captain, First Officer, Second Officer) "domicile (base city)" and "equipment type." Each new vacancy (and any secondary vacancies) are awarded by status, city and equipment type according to pilot seniority within Continental. Each bid submitted specifies a pilot's preferred positions (in descending order of preference) by status, city and equipment type.

21. Continental's System Bid process is extremely complicated due primarily to two factors: (1) the multiplicity of factors affecting a bid; and (2) the training which is required once pilots are awarded new positions. The rank of Captain is the most senior position and pays the highest salary; the rank of First Officer (co-pilot) is generally regarded as the next most desirable position; the rank of Second Officer

(Flight Engineer) is generally regarded as the least desirable and most junior position. Each of these three positions have different job duties, qualifications and training requirements pursuant to FAA regulations. Pilots are or will be based in one of five domicile locations -- Denver, Colorado, Houston, Texas, Los Angeles, California, Honolulu, Hawaii and Guam. Continental currently uses five types of equipment -- DC-9's, DC-10's, MD-80's, Boeing 727's and Boeing 737's. The DC-10 and 727 equipment require the assignment of three pilots per aircraft crew; the other equipment does not require a Second Officer-Flight Engineer and is staffed by a two-pilot crew. To expand its fleet in 1986, Continental plans to add additional Boeing-737's and other aircraft types, such as either Boeing-757 and/or the Airbus A-300.

22. Since a system bid is the means by which Continental plans its pilot training and staffing needs and by which pilots are promoted or change positions, it is essential for Continental and its pilot employees that the bidding process be conducted properly. Accordingly, Continental has established specific bidding procedures which are well known to Continental's pilots and to ALPA. A pilot who intends to bid for a vacant position must normally submit his bid in person on the official company bid form, which is in triplicate. A copy of Continental's official bid form is attached to this Verified Counterclaim as Exhibit 2. For a bid to be valid, the form must normally be submitted in person and signed "received" by a member of Continental's management.

23. Once pilots have submitted their bid forms to Continental, the sole determinant of what vacant position they will receive is their seniority level. Each type of aircraft possesses different instrumentation and operating characteristics; the Federal Aviation Regulations established by the Federal Aviation Administration require specific training and qualification for pilots assigned to each position on each

type of aircraft. See 14 C.F.R. Part 141. Pilots who are qualified to fly one position or one type of aircraft are not necessarily qualified to operate another type of aircraft or a different position on the same type of aircraft. Therefore, a pilot may bid for and, through seniority, be awarded a position on a type of aircraft which he is not qualified to fly. Such a pilot would be required to undergo extensive training before he is qualified to fly the aircraft in his new position. The dimensions of this training program are dramatically extended by two factors: (1) the need to continue and staff ongoing flight schedules while a significant number of pilots are removed from such schedules to undergo training, and (2) the "ripple effect" of contingent vacancies created when incumbent pilots are promoted to new positions, thereby opening their current positions as secondary vacancies available to less senior pilots.

24. The training system which Continental has established to qualify its pilots to operate the various kinds of equipment in its fleet is extremely costly and time-consuming. Depending upon prior training and experience, pilots attend training sessions full time for a number of weeks or even months. They receive in excess of 120 hours of classroom instruction and flight simulation.

25. Continental has established extensive procedures to ensure that such retraining is accomplished in a timely manner so that Continental has a sufficient number of trained pilots to staff new vacancies for each equipment type at each base and to operate its fleet on schedule. Continental trains its pilots, subject to availability of training facilities, in all equipment statuses simultaneously. Junior pilots (or new hires if necessary) will fill the entry level second officer positions.

26. In order for this System Bid staffing and training process to proceed, however, it is imperative that the System

Bid be reliable, i.e., that each pilot bidder will appear for training and flight duty as scheduled. Should a pilot fail to appear, the next most junior bidder is unlikely to be available as an immediate replacement because that more junior pilot will have already been retrained for another newly awarded bid position. Even if the next junior pilot were available for retraining, however, he could not be removed from his then current position without creating a secondary vacancy and an attendant "ripple effect" throughout the seniority list. When that ripple effect played out, Continental would have suffered a multitude of needless retraining requirements, with attendant delays in producing trained pilots when needed, and would still end up short staffed for new equipment and thus unable to operate the aircraft as planned. For each pilot who completes training but fails to appear for flight duty Continental will be required to train up to eight additional pilots, at a total cost of approximately ninety thousand dollars.

D. The Current System Bid

27. On September 9, 1985, Continental posted "Supplementary Base Vacancy Bid 1985-5" (Exhibit 3 to this Counterclaim). This bid announced 380 new Captain and First Officer positions which will be available in 1986 due to the continued expansion of Continental's aircraft fleet and flight schedules. The bid required all participating pilots to submit their bids by 12 noon CDT on September 18, 1985. Continental expects that the entire training process which will follow this system bid will require the training or retraining of approximately 1,200 pilots and to last eleven months; Continental estimates that this training will cost approximately 10-12 million dollars.

28. The scheduling of Continental's training procedures has required elaborate advance planning, which necessarily took into account such complex factors as the

availability of personnel, availability of facilities, maintenance of the airline's planned flight schedule and availability of equipment. The purpose of this process is two fold: (1) to insure that Continental is able to operate its flight schedule with no disruption in service, inconvenience to the traveling public or loss of revenue during the training period; and (2) to provide Continental with qualified pilots to fly its equipment on schedule at the end of such training period.

29. The comprehensive system which Continental has developed to fill the new jobs is premised on the basic assumption that those pilots who submit bids and are awarded new positions will report for training as scheduled and will report to work in their new assignments once their training is completed. If more than a handful of pilots who bid for and receive new positions do not report to training or work once their training schedule is completed, then it will be impossible for Continental to operate all of its scheduled flights. Such a disruption in Continental's service would have a devastating and long term impact on the airline. Moreover, it would adversely affect the positions of Continental's other pilots participating in the System Bid.

E. ALPA's Scheme To Harm Continental's Operations and Its Nonstriking Employees By Sabotaging Continental's System Bid.

30. On September 15, 1985, almost two full years after beginning its strike and soon after Continental withdrew its voluntary recognition of ALPA, ALPA suddenly told its striking members to (1) submit form letters stating an "unconditional offer" to return to work and (2) to participate in the current System Bid using a form which did not comply with Continental's established procedures. See Letter from Dennis Higgins, ALPA Continental MEC Chairman to all

Continental Striking Pilots, attached to this Verified Counterclaim as Exhibit 4.

31. In public statements, ALPA has made it clear that it is not calling off the strike but is simply changing tactics. Captain Henry Duffy, President of ALPA, is reported to have said that "for strategic and humanitarian reasons, our best action would be to allow striking pilots to try to get back on the property if they are so inclined." (Emphasis supplied). ALPA has also pointedly stated that "there is something to be said for having your people back on the property." See ALPA Press Release attached to this Verified Counterclaim as Exhibit 5.

32. Many of ALPA's striking pilots (all of whom have continued to accrue seniority during the strike) have attained levels of seniority which would make them eligible to win their bids for Captain positions on new equipment which require the most extensive training.

33. ALPA has instructed and directed its striking members to submit "unconditional offers" to return to work and submit bids whether they intend to return to work or not. By this action, ALPA has demonstrated its malicious and unlawful intent to undermine and sabotage the system bid process and to disrupt Continental's proper efforts to ensure the pilot training and staffing necessary for the proper conduct of Continental's flight operations. ALPA's apparent objective is to disrupt Continental's flight operations and to deprive Continental's working pilots of opportunities to advance within Continental.

34. The leadership of ALPA is composed of veteran pilots who are aware of the importance of Continental's bidding process to its schedule operations. They know that if any significant number of pilots fail to report for training or

flight duty as scheduled, the consequence would be to cripple Continental's ability to implement the airline's planned flight schedule and to cause serious and irreparable harm to Continental. ALPA has ordered its striking members to submit bids to Continental even though they do not intend to return to work with the malicious and unlawful intent to interfere with Continental's operation of its business and its ability to operate in interstate commerce.

35. As of September 18, 1985, the date on which the bidding closed, over 500 striking pilots submitted bids to Continental. Many of the bids submitted by striking pilots did not comply with Continental's established bid procedures. As a result of ALPA's actions and statements, Continental does not know how many, if any, of these striking pilots intend to return to work. ALPA's conduct has tainted the validity of the offers to return to work and system bids of all striking pilots.

#### FIRST CAUSE OF ACTION

36. Continental repeats and realleges the allegations in Paragraphs 1 through 35 as if fully state herein.

37. By its aforesaid conduct, ALPA is unlawfully engaging in economic coercion and self-help to resolve its dispute with Continental over representation. Such conduct violates Section 2, First and Ninth of the Act, 45 U.S.C. § 152, First and Ninth. In the event that ALPA's claims of continuing representative status are correct, the aforesaid acts of ALPA also violate ALPA's duty to bargain in good faith and to "exert every reasonable effort to . . . avoid any interruption to commerce or to the operation of any carrier . . ." contained in § 2, First and Second of the Railway Labor Act, 45 U.S.C. § 152, First and Second. The Norris-LaGuardia Act, 27 U.S.C. § 101 et seq., governing injunction

of peaceful labor disputes has no application because the actions to be enjoined are in violation of the Railway Labor Act. *Brotherhood of Railroad Trainmen v. Chicago River and Indiana Railroad*, 353 U.S. 30 (1957).

38. Unless enjoined by the Court, ALPA will continue its illegal activities in violation of the Act.

39. Continental has no adequate remedy at law. ALPA's course of conduct has caused an unless enjoined will continue to cause substantial irreparable injury to Continental.

### SECOND CAUSE OF ACTION

40. Continental repeats and realleges Paragraphs 1 through 35 as if fully stated herein.

41. ALPA's tampering with the bid process violates the valuable right active pilots otherwise would enjoy to bid for and assume preferred positions. This conduct maliciously interferes with the active pilots' business relationship with Continental and the right of active pilots to be free of coercion under Section 2 of the Act, 45 U.S.C. § 152.

### THIRD CAUSE OF ACTION

42. Continental repeats and realleges Paragraphs 1 through 35 as if fully stated herein.

43. The acts described in Paragraphs 30 through 35 above were committed by ALPA with malice and for no lawful purpose.

44. The acts described in Paragraphs 30 through 35 above interfered with Continental's business relations with its employees and customers.

45. In committing the acts described in Paragraphs 30 through 35 above, ALPA had no just cause or excuse for interfering with Continental's business relations with its employees and customers.

47. The acts of ALPA described in Paragraphs 30 through 35 have caused and, if not enjoined, will continue to cause actual damage to Continental in an amount in excess of 10 million dollars.

### PRAYER FOR RELIEF

WHEREFORE, Continental prays that the Court:

1. Issue a preliminary injunction, the same to be made permanent on final hearing, directing and requiring ALPA, its officers, agents, employees, and members and all persons acting in concert or participation with them to cease and desist from conducting, continuing in or engaging in efforts to interfere with Continental's system bid in any way; to cease and desist from instructing nonstriking pilots to submit bids whether or not they intend to return to work; and to cease and desist from interfering in any way with Continental's normal operations;

2. Direct ALPA to issue such notice and instructions and take all other necessary steps, including intra-union discipline, to carry into effect the order of this court;

3. Declare the rights of the parties;

4. Award Continental damages against ALPA for losses and injuries resulting from ALPA's unlawful acts;

5. Award Continental its attorneys' fees and costs in this action together with all other relief that the Court deems just and proper.

Respectfully submitted,  
AKIN, GUMP, STRAUSS, HAUER & FELD

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Dated: September 25, 1985